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# INJURIES TO INTERSTATE EMPLOYEES ON RAILROADS

A TREATISE ON THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908,  
AS AMENDED, WITH AN APPENDIX, CONTAINING A COPY OF  
THE ACT, TOGETHER WITH ALL FEDERAL STATUTES  
AND ORDERS OF THE INTERSTATE COMMERCE  
COMMISSION FOR THE SAFETY OF RAIL-  
ROAD EMPLOYEES

By MAURICE G. ROBERTS  
Of the Missouri Bar

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1915


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DEDICATION  
TO JUDGE O. M. SPENCER

WHOSE DISTINGUISHED AND HONORABLE CAREER AS A STATE'  
ATTORNEY, JUDGE AND COUNSELOR HAS PLACED HIM IN THE  
FRONT RANK OF MISSOURI'S FOREMOST LAWYERS, THE  
FOLLOWING HUMBLE EFFORT IS MOST RESPECTFULLY  
INSCRIBED BY ONE WHO HAS ENJOYED HIS  
FRIENDLY INTEREST AND HAS PROFITED  
BY HIS SANE COUNSEL



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## PREFACE

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The enactment of the Federal Employers' Liability Act of 1908 by Congress and the controlling decisions of the United States Supreme Court delivered during the years 1912, 1913 and 1914, construing and applying the statute, have revolutionized the law of liability of all railroad companies in the United States to their employes engaged in interstate commerce. Prior to the exercise by Congress of its dormant power under the interstate commerce clause of the United States Constitution by the passage of this statute which governs exclusively the liability of all railroad companies for all injuries or deaths occurring under the conditions prescribed in the act, that is, while the carrier is engaged and the injured servant is employed by it in such commerce, state laws where the casualties occurred determined the rights of the one and the liability of the other. Now one uniform law controls throughout the United States in determining the rights of interstate employes of common carriers by railroad when injured and their dependent beneficiaries in cases of death. As at least 80 per cent of all railroad employes in the United States are, under recent decisions of the United States Supreme Court, engaged in interstate commerce within the purview of this statute, the sweeping

changes by and the far reaching effect of this law in superseding state control over the subject matter of personal injuries to employes on railroads, may be readily seen.

Owing to the doubt and uncertainty as to the constitutionality of this law, prior to the decision of the national Supreme Court in the *Mondou* case, decided January 15, 1912, in which the validity of the act was sustained in all its parts, but few suits had been brought under the federal statute. Since that time the courts have been flooded with actions under this statute and up to March 1, 1915, the United States Supreme Court, alone, notwithstanding its limited power on writ of error, had delivered opinions in twenty-nine cases construing and applying this act. During the same period between 500 and 600 cases under this act have been decided by state appellate courts, federal district courts, and federal circuit courts of appeals, so that now the majority of the many and perplexing questions in the application and construction of this statute have been solved.

A text-book, therefore, dealing with the many and various problems confronting the courts by reason of the enactment of this law and citing and analyzing these hundreds of cases, many of them recently decided, by national and state courts, the author believes, should be of assistance to his fellow-lawyers and the courts and should be of permanent value. This duty, the author has attempted to fulfill during spare moments while actively engaged in the practice of law.

For the convenience of the profession parallel ref-



erences have been inserted to N. C. C. A. (where most of the cases cited in the work will be found either reported in full or thoroughly abstracted) and to L. R. A., American Annotated Cases, and the Lawyers' Edition of the United States Supreme Court Reports. References to the Federal Statutes Annotated have also been inserted in addition to the official citations.

Richmond, Mo., April, 1915.

M. G. ROBERTS.

1. The first part of the paper  
deals with the general  
principles of the theory  
of the subject.  
It is divided into two  
main sections.  
The first section  
deals with the  
general principles  
of the theory.  
The second section  
deals with the  
particular principles  
of the theory.

2. The second part of the paper  
deals with the application  
of the theory to the  
subject.

3. The third part of the paper  
deals with the application  
of the theory to the  
subject.

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# INJURIES TO INTERSTATE EMPLOYEES ON RAILROADS

## CHAPTER I

### SCOPE, PURPOSE, VALIDITY AND EFFECT OF FEDERAL ACT

- § 1. Scope of the Federal Employers' Liability Act.
- § 2. Purpose of the Act.
- § 3. First Federal Employers' Liability Act Invalid.
- § 4. Second Federal Employers' Liability Act Valid.
- § 5. Extent of Power Exercised by Congress in Passing Federal Act.
- § 6. Amendments of 1910.
- § 7. Effect upon State Laws.
- § 8. Decisions of National Courts Construing Act Control.
- § 9. Laws of State Control as to Procedure.

**§ 1. Scope of the Federal Employers' Liability Act.**—The Act of Congress, commonly known as the Federal Employers' Liability Act, was approved on April 22, 1908. This federal statute governs the rights, duties and liabilities of common carriers by railroad to their employes for personal injuries, when the injury or death occurs while the carrier is engaged and the injured servant is employed in interstate commerce. The law also applies to common carriers by railroad and all their employes in the territories and other possessions of the United States.

Nearly all railroads in the United States are con-

stantly engaged in interstate commerce. Under the controlling rulings and decisions of the national Supreme Court during the years 1912, 1913 and 1914, in cases hereinafter cited, it is conservatively estimated by those in positions to know that at least 80 per cent of all railroad employes in the United States are employed in interstate commerce, so that, if injured or killed, while so employed in interstate commerce, the remedy for the injured man, if living, and, if dead, for his dependents, is to be determined and measured by this federal act.

Employes injured while engaged in intrastate commerce are still governed by the laws of the states where the accidents occur. As to intrastate employes, the remedy provided by the state, is exclusive, and as to interstate employes, working for interstate railroads, the remedy given by the federal statute, is exclusive, so that a practitioner representing any employe, or an employe's beneficiaries in case of death, in any action for personal injuries against a common carrier by railroad, must familiarize himself with the Federal Employers' Liability Act to determine which law, if any, furnishes a remedy for his client.

**§ 2. Purpose of the Act.**—Prior to the enactment of the Federal Employers' Liability Act of 1908 the law governing the liability of railroad companies engaged in interstate commerce to their employes for personal injuries while employed in such commerce, depended upon the statutes and decisions of the state in which the accident occurred. In some states the fellow servant doctrine, that is, non-







liability of railroads for injuries to one servant by the negligence of another, was enforced, but in others it had been abolished by statute or judicial rulings. In some jurisdictions contributory negligence was a bar to the suit, while in others the employe's negligence contributing to the injury merely reduced the damages. Assumption of risk as a defense in some states was applied with its full common law vigor; but in other jurisdictions it had been partially abolished by statute or changed by judicial legislation to a mere verbal formula without substance as a defense to negligence. Some judges had held, that contracts with employes not to sue in consideration of some form of insurance or indemnity fund, were valid, while others decided to the contrary.

From this babel of judicial voices, with its consequent glaring inequities and inequalities, came the national act, declaring one rule of liability throughout the nation and with it, as a necessary concomitant, the decisions of the national courts, construing the act in all its parts, became binding upon all state courts. The fellow servant doctrine was abolished; something akin to comparative negligence was substituted for contributory negligence; assumption of risk in certain cases was abolished; contracts for a consideration of indemnity waiving the right to sue were declared void and the principle of compensation as a substitute for penalties in the way of damages which regulated recoveries in certain states, was adopted. Congress enacted this statute so that a uniform law could apply to those engaged in inter-

state commerce in all the states, and so that certain common law rules determining liability might be abolished in order to protect the lives and persons of employes, by securing a more careful selection of employes, a closer supervision of them and a more rigid enforcement of their duties.<sup>1</sup>

**§ 3. First Employers' Liability Act Invalid.**—The first Federal Employers' Liability Act of 1906, passed by Congress and approved June 11, 1906, was declared invalid by the national Supreme Court, because its terms included all who engaged in interstate commerce between the states—hacks, ferries, bridges, trolley lines, telephone and telegraph companies, and railroads—as carriers as well as *all* their employes, regardless of whether the employer was engaged in or the injured servant was employed in interstate commerce at the time of the injury.<sup>2</sup> The first act included *every* individual or corporation engaged in interstate commerce between the states and *all* their employes.

This act was broader than the constitutional power delegated by the states to the national government, and hence was invalid as being beyond the power given to Congress. The act however, was declared valid as to the District of Columbia and territories of the United States, for the reason that Congress has plenary powers in all matters relating to such territories. In the District of Columbia, the Panama

1. Kelly v. Great Northern Ry., 152 Fed. 211; Watson v. St. Louis, I. M. & S. Ry. Co., 189 Fed. 942.

2. First Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, aff'g Brooks v. Southern P. Ry. Co., 148 Fed. 986, and Howard v. Illinois C. Ry. Co., 148 Fed. 997.





Canal Zone, Alaska, Porto Rico, Hawaiian Islands and Philippine Islands, by the Act of 1906 every common carrier engaged in trade or commerce was liable "to any of its employes."<sup>3</sup>

As to carriers engaged in commerce between the states, the majority opinion held that matters under the jurisdiction of the national government and those within the sole jurisdiction of the states, were so blended in the act that they could not be separated by the court, and therefore, the whole act as to common carriers and their employes engaged in commerce between the states, must be held void. The part of the act applying to territories, was held to be capable of separation by a judicial interpretation and as so separated, it was held valid. In the 1906 Act Congress attempted to legislate upon a subject matter wholly within the power of the state and had so interblended that power with its jurisdiction over interstate commerce, that the several clauses could not be separated, and that part covering interstate commerce remain valid.

**§ 4. Second Federal Employers' Liability Act Valid.**—After the national Supreme Court declared the Act of 1906 invalid on January 6, 1908, for the reasons mentioned in the preceding paragraph, Congress passed the Second Federal Employers' Liability Act (§ 35, U. S. Stat. at L. 65 c. 149), which was approved April 22, 1908.<sup>4</sup> The first section pro-

3. The 1906 Act was valid as to these territories: *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106, aff'g 102 Tex. 378; *Atchison, T. & S. F. Ry. Co. v. Mills*, 49 Tex. Civ. App. 349.

4. The entire act without the 1910 amendments is quoted in full in *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, which was the

vides that every common carrier by railroad while engaged in interstate commerce, shall be liable to every employe while employed by such carrier in such commerce or in case of his death, to certain beneficiaries therein named, for such injury or death, resulting in whole or in part, from the negligence of the carrier, or its employes, or by defects or insufficiencies due to negligence in any of its equipments or property. The second section provides that every common carrier by railroad on lands of the United States other than states shall be liable in the same way to any of its employes. The third section provides that contributory negligence shall not bar recovery, but shall only diminish the damages, except that no employe injured or killed where the violation of a safety law for employes contributed to the injury, shall be held to have been guilty of contributory negligence. The fourth section provides that assumption of risk shall not be a defense, where the violation of a safety law contributed to the accident. The fifth section declares all contracts or devices intended to exempt the carrier from liability under the act to be void, except that the carrier may plead as a set-off any sum if paid to the injured employe as insurance or relief fund. Sec-

first case by the Missouri appellate courts construing the act. Judge Nortoni, in that case, held that the remedy provided by the act was exclusive and that a switchman on a freight train carrying freight from a point in a state to a point in another was engaged in interstate commerce and that a suit by a widow suing in her own capacity could not be maintained; in case of death, suit must be brought by the "personal representative" as required by the act. Judge Nortoni's ruling has since, in other cases, been sustained by the national Supreme Court. (See § 139, *infra*.)







tion 6 provides that any action under the act is barred after two years. Section 8 provides that the act does not limit the obligation of a common carrier under any other federal law or affect any pending suits under the 1906 Act.

After conflicting decisions by state and federal courts, the constitutionality and validity of this act in all its parts was presented to the Supreme Court of the United States and the act was declared constitutional on January 15, 1912.<sup>5</sup> In a later case the Supreme Court held § 5 of the national act valid.<sup>6</sup> These decisions render any discussion as to the validity of the Act of 1908 purely academic and such questions are now, so far as all other courts are concerned, finally and conclusively decided.

**§ 5. Extent of Power Exercised by Congress in Passing the Federal Act.**—A troublesome question to the practitioner will frequently arise as to whether the facts of his case create a cause of action under the federal act, or under the laws of the state since the remedy in each realm is exclusive. Many conflicting decisions which will be reviewed later, have already been handed down defining or holding when a railroad company is engaged in interstate commerce<sup>7</sup> or when a servant is employed in such commerce,<sup>8</sup> for under the federal act both must be so engaged to render the statute applicable and the

5. Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44.

6. Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911, 6 N. C. C. A. 103n.

7. Chapter IV, *infra*.

8. Chapter III, *infra*.

remedy therein provided is then exclusive. In the Second Employers' Liability Cases<sup>9</sup> the Supreme Court of the United States laid down general rules to be applied in determining when a railroad employe is engaged in interstate commerce, but these rules, necessarily so, were vague and indefinite so that the question of when a railroad company is employed in interstate commerce or when a servant is employed in such commerce, was necessarily left to be determined by all the facts of each particular case, and conflicting views of courts on similar facts have been the result.

These general rules as to the extent and power of Congress in dealing with the relation of railroads and their employes while the one is engaged and the other is employed in interstate commerce, were summarized by the court as follows: "The clauses in the Constitution (Art. 1, § 8, c. 3 and 18) which confer upon Congress the power 'to regulate commerce \* \* \* among the several States' and 'to make all laws which shall be necessary and proper' for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these: 1. The term 'commerce' comprehends more

9. 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44. The Second Employers' Liability Cases included the following cases appealed from different courts and decided by the United States Supreme Court at the same time and in one opinion in which all the judges concurred: *Mondou v. New York, N. H. & H. R. Co.*; *Northern P. Ry. Co. v. Babcock*; *New York, N. H. & H. R. Co. v. Walsh*; *Walsh v. New York, N. H. & H. R. Co.*







than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase 'among the several States' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

3. 'To regulate,' in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employes.

6. The duties of common carriers in respect of the safety of

their employes, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. *Cooley v. Board of Wardens*, 12 How. (U. S.) 299, 315-317 (11 L. Ed. 996, 1003, 1 N. C. C. A. 882); *The Lottawanna*, 21 Wall. (U. S.) 558 (22 L. Ed. 654); *Sherlock v. Alling*, 93 U. S. 99, 103-105 (23 L. Ed. 819); *Smith v. Alabama*, 124 U. S. 465, 479 (31 L. Ed. 508); *Nashville, etc., Ry. Co. v. Alabama*, 128 U. S. 96, 99 (52 L. Ed. 352); *Peirce v. Van Dusen* (24 C. C. A. 280), 78 Fed. 693, 698-700 (69 L. R. A. 705); *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 378 (37 L. Ed. 772); *Patterson v. Bark Eudora*, 190 U. S. 169, 176 (47 L. Ed. 1002); *Johnson v. Southern Pacific Co.*, 196 U. S. 1 (49 L. Ed. 363, 3 N. C. C. A. 784); *Schlelmer v. Buffalo, etc., Ry. Co.*, 205 U. S. 1 (51 L. Ed. 681, 1 N. C. C. A. 859n, 4 N. C. C. A. 483n); *Employers' Liability Cases*, 207 U. S. 463, 495 (52 L. Ed. 297); *Adair v. United States*, 208 U. S. 161, 176, 178 (52 L. Ed. 436); *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618 (55 L. Ed. 878); *Southern Railway Co. v. United States*, 222 U. S. 20 (56 L. Ed. 72, 3 N. C. C. A. 822).''

**§ 6. Amendments of 1910.**—In 1910 Congress passed two important amendments to the Federal Employers' Liability Act. One provides that any action under the act may be brought in a circuit court of the United States in the district of the residence of the defendant, or in which the cause of





action arose or in which the defendant shall be doing business at the time of commencing such action, and further provides that the jurisdiction of the courts of the United States shall be concurrent with that of the courts of the several states, and any case arising under the act and brought in any state court shall not be removable to any court of the United States. The second amendment provides, that, "any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe and, if none, then of such employe's parents, and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury." <sup>10</sup>

**§ 7. Effect Upon State Laws.**—As to all injuries or deaths happening under the conditions defined in the act, i. e., while both carrier and employe are engaged in interstate commerce, the remedy therein given is exclusive and all state laws in so far as they attempt or do cover the same field are superseded. <sup>11</sup>

10. The first amendment was the result of the decision in *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 17 Ann. Cas. 324, holding that Congress did not intend that jurisdiction of cases under the act should be assumed by state courts. The *Hoxie* case was overruled later in *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44. The second amendment resulted from the decision of Judge Rogers in *Fulgam v. Midland V. R. Co.*, 167 Fed. 660, and of Judge Lowell's decision in *Walsh, Adm'r, v. New York, N. H. & H. R. Co.*, 173 Fed. 494, holding that a right of action given to the injured employe under the act of 1908, did not survive to his personal representative in the event of his death, but as at common law, perished with the injured person.

11. *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327,

The act supersedes all state and territorial laws over the matter with which it deals. If the injury or death occurred under the circumstances defined in the act, there is no choice of remedy except the federal act. Since the act is exclusive an employee injured while employed in interstate commerce by a common carrier by railroad also engaged in such commerce, must bring his action upon this statute and no other; and the same is true as to the personal representatives in cases of death.<sup>12</sup> State legislation on contributory negligence, assumption of risk or who may recover in case of death, are nugatory as to all casualties happening under the conditions described in this act, that is, while both carrier and employee are engaged in interstate commerce.<sup>13</sup>

In the *Mondou* case (Second Employers' Liability Cases) cited in the notes, Mr. Justice Van Devanter,

1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031; *Illinois C. R. Co. v. Doherty's Adm'r*, 153 Ky. 363, 6 N. C. C. A. 75n, 440n, 444n, 47 L. R. A. (N. S.) 31n; *Rich v. St. Louis & S. F. Ry. Co.*, 166 Mo. App. 379; *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 101, 102n.

12. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n; *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, rev'g judgment in same case reported in — *Tex. Civ. App.* —, 147 S. W. 1188; *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879, rev'g same case reported in 5 *Porto Rico Fed. Rep.* 273; *Gee v. Lehigh Valley R. Co.*, 148 N. Y. Supp. 882.

13. *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 101n, 102n; *St. Louis, S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n; *DeAtley v. C. & O. Ry. Co.*, 201 Fed. 591; *St. Louis S. W. Ry. Co. v. Brothers*, — *Tex. Civ. App.* —, 165 S. W. 488; *Vaughn v. St. Louis & S. F. Ry. Co.*, 177 Mo. App. 155, 6 N. C. C. A. 75n, 438n, 439n; *Flanders v. Georgia & F. Ry. Co.*, — *Fla.* —, 67 So. 68; *Toledo, St. L. & W. R. Co. v. Slavin*, — *U. S.* —. decided Feb. 23, 1915.







speaking for the court, said: "The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316 (4 L. Ed. 579), (p. 405): 'If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no State is willing to allow others to control them. The nation, on these subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof, \* \* \* shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state, to the contrary notwithstanding' (p. 426). This great principle is, that the constitution and the laws

made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.' And particularly apposite is the repetition of that principle in *Smith v. Alabama*, 124 U. S. 465, 473 (31 L. Ed. 508): 'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.' True, prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock v. Alling*, 93 U. S. 99 (23 L. Ed. 819); *Smith v. Alabama*, 124 U. S. 465, 473, 482 (31 L. Ed. 508); *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 99 (52 L. Ed. 352); *Reid v. Colorado*, 187 U. S. 137, 146 (47 L. Ed. 108). The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. (U. S.) 558, 581 (22 L. Ed.







654); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215 (29 L. Ed. 158). And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. Gulf, Colorado and Santa Fe Railway Co. v. Hefley, 158 U. S. 98, 104 (39 L. Ed. 910); Southern Railway Co. v. Reid, 222 U. S. 424 (56 L. Ed. 257); Northern Pacific Railway Co. v. Washington, 222 U. S. 370 (56 L. Ed. 237).''

**§ 8. Decisions of National Courts Construing Act Control.**—In construing the Federal Employers' Liability Act, the decisions of the national courts control over those of the state courts. For example, in determining when a carrier is guilty of negligence under the act; when an employe assumes the risk; what proof creates a dependency in death cases within the meaning of the act; whether the doctrine of *res ipsa loquitur* applies; whether there is any evidence tending to show liability sufficient for the case to be submitted to the jury; the measure of damages and instructions thereon, are all matters upon which the decisions of the national courts control.<sup>14</sup> Where the decisions of the federal courts

14. St. Louis, I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179, rev'g 145 Ky. 427; Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 101, 102n; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n; Charleston & W. C. R. Co. v. Brown, — Ga. —, 79 S. E. 932; McAdow v. Kansas City W. R. Co., — Mo. App. —, 6 N. C. C. A. 76n, 206n, 233n, 164 S. W. 188; Hardwick v. Wabash R. Co., 181 Mo. App. 156; Montgomery v. Southern P. Ry. Co., 64 Ore. 597, 47 L. R. A. (N. S.) 13n; Horton v. Oregon, W. R. & N. Co., 72 Wash. 503, 3 N. C. C. A. 784, 47 L. R. A. (N. S.) 8n; Lauer v. Northern Pac. Ry. Co., — Wash. —, 145 Pac. 606. *Contra*: On

on a question under the act are conflicting, then a state court will follow those decisions of the national courts which appear to it to rest on the better reason.<sup>15</sup>

**§ 9. Laws of State Control as to Procedure.**—In all actions under the Federal Employers' Liability Act prosecuted in the state courts, the rules of practice and procedure are governed by the laws of the states where the cases are pending.<sup>16</sup> Questions as to whether amendments shall be permitted to petitions or answers; when motions to elect should be sustained or overruled; the rules of evidence; variances; excessiveness of verdicts and similar questions of practice and procedure, are matters to be determined solely by the state courts in accordance with the statutes of the state and their rules applying the same.<sup>17</sup>

assumption of risk, *Fish v. Chicago, R. I. & P. Ry. Co.*, — Mo. —, 172 S. W. 340; as to what is negligence under the act, *Louisville & N. R. Co. v. Johnson*, — Ky. —, 171 S. W. 847. (See § 18, *infra*.)

15. *Ruck v. Chicago, M. & St. P. Ry. Co.*, 153 Wis. 158, 6 N. C. C. A. 204n.

16. *Brinkmeier v. Missouri P. Ry. Co.*, 224 U. S. 268, 56 L. Ed. 758, 3 N. C. C. A. 795n, aff'g same case reported in 81 Kan. 101; *Fleming v. North C. R. Co.*, 106 N. C. 196, 6 N. C. C. A. 78n, 229n.

17. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1227, 6 N. C. C. A. 224; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 58 L. Ed. 860; *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 4 N. C. C. A. 227n, 5 N. C. C. A. 771n; *Louisville & N. R. Co. v. Strange*, 156 Ky. 439, 6 N. C. C. A. 75n, 82n, 83n, 185n; *Midland V. R. Co. v. Ennis*, — Ark. —, 159 S. W. 215; *Bouchard v. Central V. R. Co.*, 87 Vt. 399, 6 N. C. C. A. 78n, 81n; *Bankson v. Illinois C. R. Co.*, 196 Fed. 171; *Armbruster v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 6 N. C. C. A. 195n, 147 N. W. 337; *Sweet v. Chicago & N. W. Ry. Co.*, 157 Wis. 400, 6 N. C. C. A. 78n, 94n, 232n, 451n; *Burnett v. Atlantic C. L. Co.*, 163 N. C. 186, 6 N. C. C. A. 103n, 104n; *Tinkham v. Boston & M. R. Co.*, 77 N. H. 111, 6 N. C. C. A. 81n, 233n; *Atkinson v. Bullard*, — Ga. —,





6 N. C. C. A. 80n, 183n, 80 S. E. 220; Louisville & N. R. Co. v. Stewart, 156 Ky. 550, 6 N. C. C. A. 79n, 447n, 450n, 454n; Kansas City S. Ry. Co. v. Leslie, — Ark. —, 6 N. C. C. A. 446n, 447n, 453n, 454n, 167 S. W. 92; Winters v. Minneapolis & St. L. R. Co., — Minn. —, 6 N. C. C. A. 78n, 201n, 148 N. W. 106; Gibson v. Bellingham & N. Ry. Co., 213 Fed. 488; State statutes requiring notice of injury not applicable under Federal Act. El Paso & N. E. Ry. Co. v. Gutierrez, 215 U. S. 87, 54 L. Ed. 106.

## CHAPTER II

### NEGLIGENCE UNDER THE FEDERAL ACT

- § 10. The Statutory Provision.
- § 11. Two Branches of Negligence Under First Section.
- § 12. Negligence Criterion of Liability Under National Statute.
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- § 15. Meaning of the Phrase "In Whole or in Part."
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- § 17. Casualties Due to Sole Negligence of Employees.
- § 18. In Actions Under Federal Act Prosecuted in State Courts Decisions of National Courts Control in Determining Negligence—Contrary Rulings.
- § 19. Negligence of Human Agencies Not Limited to Fellow Servants as Construed Under Common Law.
- § 20. Statute Covers Negligent Act of Intrastate Employes and Defects in Instrumentalities Used Solely in Intrastate Commerce.
- § 21. Negligence Need Not Be Proven When Violation of Federal Safety Appliance Act Is Cause of Injury.
- § 22. Applicability of Doctrine of *Res Ipsa Loquitur* Under Federal Act—Conflicting Rulings.
- § 23. Cases Under Federal Act in Which the Facts Were Held to Show Actionable Negligence.
- § 24. Cases Under Federal Act in Which the Facts Were Held Not to Show Actionable Negligence.
- § 25. Willful Wrongs Not Within Terms of Act.

**§ 10. The Statutory Provision.**—The first section of the Federal Employers' Liability Act provides that every common carrier by rail while engaging in interstate commerce and while the servant injured or killed is employed in such commerce, is liable "for







such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipments.”

**§ 11. Two Branches of Negligence Under First Section.**—The clause relating to negligence in the first section of the federal act has two branches; one governing the negligence of any of the officers, agents or employes of the carrier, which abolishes the common law fellow-servant doctrine; and the other relating to defects and insufficiencies due to negligence in the railroad’s rolling stock, machinery, track, road-bed, works, boats, wharfs or other equipment. These two clauses, it has been held, cover any and all negligent acts of which the carrier could have been guilty under the common law.<sup>1</sup>

**§ 12. Negligence Criterion of Liability Under National Statute.**—Except that it abolishes the common law rule of non-liability for injuries to employes within its terms due to negligence of fellow servants, the first section of the Federal Employers’ Liability Act which defines when a carrier is liable, adopts the common law rule of negligence as to the two branches of liability mentioned. Under the act, the company is not a guarantor of the safety of the place of work or of the machinery and appliances of the company. The extent of its duty to its employes, is, to see that ordinary care and prudence are exercised to the end that the place in which the work

1. *DeAtley v. Chesapeake & O. R. Co.*, 201 Fed. 591.

is to be performed and the tools and appliances of the work may be safe for the workmen.<sup>2</sup> To convict a defendant railroad company under the first section as to defects, the plaintiff must prove the existence of the defect complained of; that it was a defect of such a character as to cause its existence to be a negligent failure on the part of the defendant and that the defect was the proximate cause of the injury.<sup>3</sup>

In the Horton case, cited in the notes, which is the leading case construing the first section of the federal act, defining when a carrier by railroad is liable, the plaintiff brought suit under the federal act in a state court in North Carolina. The statute of North Carolina provides that "any servant or employe of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employe who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employe or agent of the company, or

2. Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n, rev'g the same case reported in 162 N. C. 424.

3. Seaboard A. L. Ry. Co. v. Moore, 228 U. S. 433, 57 L. Ed. 907, 3 N. C. C. A. 812; Helm v. Cincinnati, N. O. & T. P. Ry. Co., 156 Ky. 240, 6 N. C. C. A. 83n, 84n; South Covington & C. St. Ry. Co. v. Finan's Adm'r, 153 Ky. 340. *Accord*, Long v. Southern Ry. Co., — Ky. —, 159 S. W. 779; Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 6 N. C. C. A. 75n, 196n; Charleston & W. C. R. Co. v. Brown, 13 Ga. App. 744; Neil v. Idaho & W. N. R. Co., 22 Idaho 74; McCullough v. Chicago, R. I. & P. R. Co., — Iowa —, 6 N. C. C. A. 78n, 449n, 451n, 142 N. W. 67; Owens v. Chicago G. W. R. Co., 113 Minn. 49.







by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." Notwithstanding the fact that the plaintiff was suing solely under the national statute, the trial court instructed the jury on the theory that this statute governed in determining negligence under the federal act. Upon the issue of defendant's negligence, the charge to the jury was in part as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." Another instruction given was: "If you find from the evidence that it (the locomotive engine) was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue 'Yes.' "

Condemning these instructions as being improper under the federal act, Mr. Justice Pitney, for the court, said: "And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place or work and of the appliances for the work. \* \* \* In these instructions the trial judge evidently adopted the same measure of responsibility respecting the

character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employers' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases*, 223 U. S. 1, 55 (56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. [N. S.] 44). \* \* \*

It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employes is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. *Hough v. Railway Co.*, 100 U. S. 213, 217 (25 L. Ed. 612); *Washington & Georgetown Railroad Co. v. McDade*, 135 U. S. 554, 570 (34 L. Ed. 235); *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 67 (48 L. Ed. 96). To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common law rule, cer-





tainly the Act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error." 4

**§ 13. Negligence Must Be Proximate Cause of Injury.**—For the plaintiff to recover under the Federal Employers' Liability Act it is not sufficient that he prove negligence and injury under conditions within the terms of the act. To create a jury issue, the plaintiff must introduce proof tending to show that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation must depend largely upon the circumstances of each case. The inquiry whether proof having such tendency has been introduced, is not to be solved by indulging in mere surmises or conjecture or by resorting to imaginary possibilities, for to do so would but resolve the question to the generic rule of liability as an insurer. Applying these principles to a case under the act where the negligence charged was a violation of the national Hours of Service Act, the national Supreme Court

4. The court, in speaking of the liability under the Federal Act in this case, was considering causes of injuries or deaths not included in the Federal Safety Appliance Act. If the cause of the injury or death of an employe on an interstate railroad is due to violation of the Federal Safety Appliance Act, no negligence need be shown. Section 21, *infra*.

held that proof of working overtime does not create an unconditional liability for accidents in the absence of proof showing a connection between the accident and the working overtime.<sup>5</sup>

**§ 14. Actionable Negligence Must Have Natural Relation to Employment.**—The carrier is not liable for every act of negligence causing injury to one employe by another. The negligent act causing the injury or death must have been committed while the employe at fault was in the prosecution of the carrier's business. Where the negligent act which causes an injury to or the death of an employe had no relation whatever to the employment the carrier is not liable for the employe at fault must have been, when committing the act, within the scope of his employment.<sup>6</sup> And if an employe is injured or killed at a time and place and from a cause disconnected with his employment for the carrier, the carrier is not liable for the statute requires the servant injured to have been at the time employed in interstate commerce.<sup>7</sup>

5. *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, reversing same case reported in 145 Ky. 427; *Helm v. Cincinnati, N. O. & T. P. R. Co.*, 156 Ky. 240, 6 N. C. C. A. 83n, 84n.

6. *Hobbs v. C. N. Ry. Co.*, — Wash. —, 6 N. C. C. A. 84n, 90n, 142 Pac. 20; *Rief v. Great N. Ry. Co.*, — Minn. —, 148 N. W. 309; *Missouri, K. & T. Ry. Co. v. West*, — Okla. —, 134 Pac. 655; *Cincinnati, N. O. & T. P. Ry. Co. v. Wilson*, — Ky. —, 171 S. W. 430; *Reeve v. Northern P. Ry. Co.*, — Wash. —, 144 Pac. 63; *Martin v. Atchison, T. & S. F. Ry. Co.*, — Kan. —, 145 Pac. 849; *Moyse v. Northern P. Ry. Co.*, 41 Mont. 272.

7. *Padgett v. Seaboard A. L. Ry. Co.*, — S. C. —, 83 S. E. 633; *Sanders v. Charleston & W. C. Ry. Co.*, — S. C. —, 6 N. C. C. A. 200n, 81 S. E. 283; *Ewald v. Chicago & N. W. R. Co.*, 70 Wis. 420, 5 Am. St. Rep. 178; *Hurst v. Chicago, R. I. & P. R. Co.*, 49 Iowa 76; *Dickinson v. West End St. R. Co.*, 177 Mass. 365, 52 L. R. A. 110.







In *Reeve v. Northern P. Ry. Co.*, cited in the notes, plaintiff was a laborer in the employ of the railroad company and, as a part of his duties, supplied baggage cars of the defendant with water and fuel. When injured he was sitting on the floor of a baggage car in the door with his feet hanging outside of the door resting on the iron steps or stirrups which hung below. While so sitting two other employes of the company began wrestling or scuffling in the body of the car and while so engaged, whether intentional or not does not appear in the evidence, one of them brushed against or pushed the plaintiff, causing him to fall to the ground and he sustained injuries. Under these facts, in an action under the Federal Employers' Liability Act, the court, in denying a recovery, held that a railroad company was not liable unless the negligent act occurred while the employes were doing some act required of them in the prosecution of the carrier's business and that the federal statute was not intended to cover negligent acts of an employe in no way connected with the business, the prosecution of which he was employed to aid.

In *Sanders v. Charleston & W. C. Ry. Co.*, also cited in the notes, the plaintiff was a track laborer and during working hours assisted a gang in relay-

A brakeman on an interstate train after reaching the terminal with his train and before he was discharged for the day, went into a saloon near the railroad yards to get a drink. While returning to the yards he was struck and injured by a car, due to the negligence of other employes. The court held that notwithstanding the fact that he was returning from a personal errand, he was nevertheless employed in interstate commerce. *Grober v. Duluth, S. S. & A. Ry. Co.*, — Wis. —, 150 N. W. 489.

ing rails on the defendant's lines of railway and had been so engaged for some weeks. At night he slept on a bunk in a shanty car on a work train which stood on a side track. While asleep at night in that car he was injured in a collision with another train. The Supreme Court of South Carolina, under these facts, held that the plaintiff at the time of his injury was engaged in interstate commerce. In answering the contention of counsel that the plaintiff was not at the time employed in interstate commerce, the court said: "When the plaintiff was in the bunk of his shanty in 'sleep that knits up the ravelled sleeve of care' and getting strength to lay rails next day, the law imputed to him actual service on the track and extended to him the rights of such a worker; 'for the letter (of the law) killeth but the spirit giveth life.'" Notwithstanding the pre-eminent authority cited and quoted from to fortify the decision, the ruling of the court in this case was palpably erroneous, for railroad employes while asleep at night and not on duty are not then "employed by the carrier in interstate commerce," no matter whether they are taking their rest and sleep in their own homes or in places furnished them by the railroad company by reason of the transitory nature of their work.

In *Padgett v. Seaboard A. L. Ry. Co.*, cited, another case decided by the Supreme Court of South Carolina, an engineer came into a roundhouse with his engine at 10:30 p. m. His regular course of duty required him to leave the same place at 6:00 o'clock on the next morning. Close to the roundhouse the







railroad company had a small boarding house for the convenience of its trainmen, but it was managed by a private party. The engineer after leaving his engine at the roundhouse, found the boarding house was full and he then returned into the roundhouse and, climbing into an engine, went to sleep. About 4:30 a. m. the engine in which he was asleep was taken out of the roundhouse to a coal chute in the yards. There the engineer waked up and got off of the engine. He inquired where his engine was and was told that it was in the roundhouse on a certain track. He was last seen alive going towards the roundhouse. At the time he was due to leave that morning he could not be found and his train departed without him. Later in the morning he was found in an open uncovered pit in the roundhouse, dead. His engine had been standing with the step over this pit, which was about eight feet deep. In an action for damages brought under the federal act for his death it was contended that he was not at the time employed in interstate commerce. There was evidence introduced to show that the engine when it was brought into the yard the night before needed repairs and that the rules required the engineer to inspect his engine about half an hour before leaving time. There was no evidence that the engineer was forbidden to inspect his engine before that time; but there was evidence that if the inspection at the required hour disclosed the repairs had not been made, the engine would have to be returned to the roundhouse for that purpose and that the repairs would require time and cause delay. Under these

facts the court held that the jury was justified in finding that the engineer at the time of his death was employed in interstate commerce, Judges Hydrick and Gage dissenting.

In *Cincinnati, N. O. & T. P. Ry. Co. v. Wilson*, cited in the notes, a section foreman on a train standing on the passing track at a station, erroneously thinking that another train approaching at a rapid rate of speed was about to collide with it, warned his men to jump, which they did, the foreman with them. The decedent, one of the section men under him, ran across the main line of the railroad at that place and was struck and killed by the other train. Answering a contention that the foreman was not acting within the course of his employment, the court held that the act of the foreman in shouting and warning the men was one within the scope of his employment and was an act fairly imputable to the master imposing legal liability therefor.

In *Rief v. Great N. Ry. Co.*, cited in the notes, the plaintiff was a "student brakeman" receiving no compensation from the railroad company. For 12 days previous to the injury he had been upon defendant's trains in that capacity. At the time he entered upon his course of learning he signed a written statement in which he agreed that he should receive no compensation and that he would not be held to be a servant but a licensee upon the property of the defendant. He was injured while attempting to descend from a box car to throw a switch by striking a coal chute close to the track. In an action under the federal act the court held that the plaintiff was





an employe of the defendant as a matter of law, as the testimony showed that he was expected to perform and did perform such tasks as were assigned him by members of the crew in charge of the trains. He helped load and unload freight at way stations, threw switches and did whatever he was ordered to do in the operation of a train.

In *Hobbs v. Great N. Ry. Co.*, cited in the note, the decedent was killed while riding upon the pilot of an engine. He was a hostler's helper and his last work was placing sand in the engine. In doing this work the deceased was not required to ride on a pilot. No one knew why he stepped upon the pilot. The engine in moving collided with the footboard of another switch engine, which was not visible because of escaping steam, and this caused decedent's death. There was a rule of the railroad company forbidding employes to ride on engine pilots and the decedent in addition had been specifically told not to ride on pilots. The court in denying that the railroad company was liable, said: "The rule of liability against a railway company engaged in interstate commerce is predicated upon the duty of the company to furnish its servant with a reasonably safe place in which to perform the work it requires of him or while he has to be in those places which are incident to his work, and this duty is incident to all places where the employe must necessarily be in connection with his employment. But that duty is not incident to his place where a servant is not required to be nor expected to be in the performance of his work. Nor does it cover the servant when

he is not within the scope of his employment or doing some act which is not incidental to his employment. This rule is sustained by all authorities and the federal act in no wise attempts to change it. Unless the evidence in this case shows that the deceased was upon the pilot of his engine in discharge of some duty required by the railroad company, then the railroad company owed him no duty except to avoid injuring him after it discovered his perilous position. Such is so clearly the law that it will not be doubted and no authorities need be cited to sustain it. There is no evidence in this record that the deceased was required to do any act which would place him upon the pilot of the engine. All the evidence on this subject is to the contrary. So far as we can find, whatever it was that caused him to step upon the pilot, it was his own purpose, not in any way connected with his work as a hostler's helper. If it was his purpose to engage in any task, so far as this record gives, in so doing he was a volunteer without appellant's direction or knowledge and so far as the law is concerned the result is the same. If we could find anything in the evidence which would justify a different conclusion, however meager it might be, we would submit to the verdict as determinative of the fact. But we cannot find it and such being the case, however unfortunate or distressing the circumstances may be, it is our duty to so hold."

**§ 15. Meaning of the Phrase "In Whole or in Part."**—Liability is shown under the federal act when the plaintiff proves that the injury or death was due either "in whole or in part" to negligence







of the defendant. This phrase is an adoption of the common law doctrine of concurrent causes. Although causes for which the carrier is not liable, contributed directly to produce the injury, yet if a cause for which the carrier is liable, that is, a negligent act of any other employe or a defect or insufficiency due to negligence in equipment or works, contributes also as cause, without which the injury would not have occurred, the carrier is still liable. The quoted phrase means nothing more or less than that the negligent act of the carrier must be the proximate cause of the injury and in cases of doubt, to ascertain when a negligent act is the proximate cause under the federal law, decisions of courts passing upon such questions under the common law, are applicable.<sup>8</sup>

**§ 16. Recovery Cannot Be Defeated by Calling Plaintiff's Act Proximate Cause When Defendant's Negligence Is Part of Causation.**—There can be no recovery under the federal act when the injury is due solely to the negligence of the injured servant. When the defendant's act is no part of the causation, then it is not liable; but if the injury resulted in whole or in part from the company's negligence, the statute cannot be nullified and the right of recovery

8. *Union P. R. Co. v. Fuller*, 122 C. C. A. 359, 204 Fed. 45; *Bowers v. Southern Ry. Co.*, 10 Ga. App. 367, 1 N. C. C. A. 841n; *Louisville & N. R. Co. v. Wene*, 202 Fed. 887; *Shugart v. Atlantic, etc., Ry. Co.*, 66 C. C. A. 379, 133 Fed. 505; *Choctaw, etc., Ry. Co. v. Hoolaway*, 191 U. S. 334, 48 L. Ed. 207; *Milwaukee, etc., R. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Travelers' Ins. Co. v. Melick*, 12 C. A. A. 544, 65 Fed. 178, 27 L. R. A. 629; *St. Louis, I. M. & S. Ry. Co. v. Needham*, 16 C. A. A. 457, 69 Fed. 823; *Misouri, etc., Ry. Co. v. Byrne*, 40 C. A. A. 402, 100 Fed. 359.

defeated by calling the plaintiff's act the proximate cause of the injury.<sup>9</sup>

**§ 17. Casualties Due to Sole Negligence of Employee, No Recovery Under Federal Act.**—If the sole cause of an employee's injury or death is his own act whether negligent or not, there can be no recovery under the federal act.<sup>10</sup> For instance, a recovery was denied upon this principle under the following facts: Deceased, a flagman, was sent by a bridge foreman a certain distance on the track from a bridge on which repairs were being made, to protect the bridge crew by "flagging" all passing trains. While on duty he was struck and killed by a train approaching from the direction of the bridge. In an action for damages under the federal act, it was claimed that his death was due in part to the negligence of the employees in charge of the train in failing to keep a lookout and to give a reasonable warning of the approach of the train; but the court held that the defendant did not owe the decedent the duty of keeping a lookout for him and as there was no evidence that the train operatives actually saw him in a position of peril in time to have, by exercising ordinary care, prevented his death, a verdict of the jury for defendant was approved. In the course of the opinion, the court said: "When a flag-

9. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185; *Grand Trunk W. Ry. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836; s. c., 233 U. S. 42, 58 L. Ed. 838, 6 N. C. C. A. 90n, 91n, Ann. Cas. 1914 C 168n; *Louisville & N. R. Co. v. Wene*, 202 Fed. 892; *Spokane & I. E. R. Co. v. Campbell*, 217 Fed. (C. C. A.) 518.

10. *Grand T. W. Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 6 N. C. C. A. 90n, 91n; Ann. Cas. 1914 C 168n.





man is sent out to watch for trains and warn them of danger, the company and its trainmen have a right to presume that he will not only watch for trains but also for his own safety and his failure to do this is his own negligence" and "if one's death is caused solely by his own negligence, he cannot recover under either the state law or the Federal Employers' Liability Act." <sup>11</sup>

In another case under the federal act the Kansas City Court of Appeals held that there was no liability for the death of a brakeman who, having signaled the engineer to slow down the speed of a backing train on a curve at night voluntarily placed himself in a place of danger between the moving cars and a freight loading platform where he could not signal the engineer and could not have been seen by him because of the curve, and was crushed to death between the platform and a side of a moving car as he was attempting to vault onto the platform. There was a safe place for the decedent to stand on the opposite side of the track where there was no obstruction. Discussing the legal effect of these facts, Judge Trimble, for the court, said: "Under the (Federal) Employers' Liability Act, if there was negligence on the part of the defendant, contributory negligence of the deceased does not bar a recovery but only diminishes the damages in proportion to the amount of negligence attributable to such employe. Where, however, there is no negligence on the part of the master, but the injury is solely the

11. *Ellis v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 6. N. C. C. A. 103n, 543n.

result of the employe's negligence, there can be no recovery. That such is the case here we think there can be no doubt. Pankey gave the slow signal and then went from a place of safety and, without notice or intimation to anyone, placed himself in an exceedingly dangerous situation. He was not required to do this in the performance of his work. And, when the danger of his situation evoked a warning from his conductor, he voluntarily chose a dangerous instead of an easier and a surely safe way out. This last was in itself negligence." <sup>12</sup>

**§ 18. In Actions Under Federal Act Prosecuted in State Courts, Decisions of National Courts Control in Determining Negligence—Contrary Rulings.**—Prior to the enactment of the Federal Employers' Liability Act, state courts as well as national courts had uniformly held that in construing and interpreting all federal statutes, the state courts were controlled by the decisions of the national courts.<sup>13</sup> Adopting the same principle, in all actions prosecuted in the courts of one state for injuries occurring in another state, the construction which the courts of the latter state placed upon common law principles of negligence has uniformly been followed by the courts where the actions were prosecuted although different from their own interpretation and

12. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185.

13. *Haseltine v. Central Nat. Bank*, 155 Mo. 66; *Gilmore v. Sapp*, 100 Ill. 297; *First Nat. Bank v. Turner*, 154 Ind. 497; *Board of Trustees v. Cuppett*, 52 Ohio St. 567; *Hall v. Hall*, 41 Wash. 186; *Bank of Garrison v. Malley*, 103 Tex. 562; *Beckman Lumber Co. v. Acme Harvester Co.*, 215 Mo. 221; *Elwell v. Hicks*, 180 Ill. App. 554; *Pecos & N. T. Ry. Co. v. Cox*, 105 Tex. 40.







construction of the common law.<sup>14</sup> But in determining when a carrier by railroad is guilty of negligence under the Federal Employers' Liability Act, at least one court has carved out an exception to the general rule that the decisions of the national courts do not control in construing a national statute.<sup>15</sup>

In *Louisville & N. R. Co. v. Johnson*, cited in the notes, the court held that in determining negligence under the national statute, if the evidence is sufficient to support a verdict under the state law, it is sufficient under the federal statute. The language of the court in the opinion on this point is as follows: "In administering the Federal Employers' Liability Act in our courts, we think the practice and procedure followed in the trial of common law actions generally should be observed in the trial of cases under this act. *C. & O. R. Co. v. Kelley*, 160 Ky. 296, 169 S. W. 746. In other words, excepting so far as

14. *Chandler v. St. Louis & S. F. R. Co.*, 127 Mo. App. 34; *Root v. Kansas City S. Ry. Co.*, 195 Mo. 348, 6 L. R. A. (N. S.) 212n; *Alexander v. Pennsylvania R. Co.*, 48 Ohio St. 623; *State to use of Allen v. Railway*, 45 Md. 41; *Pullman Co. v. Lawrence*, 74 Miss. 782; *Bewster v. Chicago N. W. Ry. Co.*, 114 Iowa. 144, 89 Am. St. Rep. 348; *Koecher v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 122 Minn. 458; *White v. Seaboard A. L. Ry. Co.*, — Ga. —, 80 S. E. 667; *Western U. T. Co. v. White*, — Tex. Civ. App. —, 5 N. C. C. A. 377n, 162 S. W. 905.

15. *Gray v. Southern Ry. Co.*, — N. C. —, 83 S. E. 489 (Brown and Walker, J.J., dissenting); *Louisville & N. R. Co. v. Johnson*, — Ky. —, 171 S. W. 847; *Helm v. Cincinnati, N. O. & T. P. Ry. Co.*, 156 Ky. 240, 6 N. C. C. A. 83n, 84n; *contra*, *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156; *McAdow v. Kansas City W. Ry. Co.*, — Mo. App. —, 6 N. C. C. A. 76n, 206n, 233n, 164 S. W. 188; *Nashville C. & St. L. Ry. Co. v. Henry*, 158 Ky. 88, 4 N. C. C. A. 495n, 6 N. C. C. A. 99n, 106n; *Dooley v. Seaboard A. L. Ry. Co.*, 163 N. C. 454, 6 N. C. C. A. 440n, 442n, 452n; *Peery v. Illinois C. R. Co.*, 123 Minn. 264, 6 N. C. C. A. 184n; s. c., — Minn. —, 150 N. W. 382.

the act itself modifies or changes rules of practice and procedure or substantive law, cases arising under the act should be heard and determined in the state courts in the same manner as would like cases arising under the law prevailing in this state. If the evidence in a case heard and determined under this act would be sufficient to take the case to the jury and support the verdict if the suit had been brought under the state law, it would be sufficient to take the case to the jury and support the verdict if it was brought under the Federal Act." It is true that the law of procedure of the state where the action is pending governs in all cases under the Federal Act <sup>16</sup> but as to "substantive law" referred to in this opinion, the decision is in conflict with prior rulings of the national Supreme Court.<sup>17</sup> In the McWhirter case, cited in the notes, it was specifically held that the question of whether a demurrer to the evidence should have been sustained or overruled, was a federal question to be determined in conformity with the rulings of the United States Supreme Court.

In the Horton case, also cited in the notes, the trial court, on the question of negligence, in instructing the jury, formulated the charge in conformity with the law of the state. This was declared errone-

16. Section 9, *supra*.

17. Seaboard A. L. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n; St. Louis, I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179, reversing same case reported in 145 Ky. 427. The Kentucky Court of Appeals reaffirmed the ruling made in Louisville & N. R. Co. v. Johnson, *supra*, in the later case of Louisville & N. R. Co. v. Winkler, — Ky. —, 173 S. W. 151, decided February 18, 1915.





ous, the court saying: "In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work and the appliance for the doing of the work that is prescribed by the local statute. But it is settled that since Congress, by the Act of 1908, took possession of the field of the employers' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded." In *Helm v. Cincinnati, N. O. & T. P. Ry. Co.*, cited in the notes, the court held that since the Federal Act did not undertake to define negligence and in no way limited the application of the common law rule upon the subject and since there was no federal common law, it was the common law of the state where the accident occurred, to which the court must look in determining whether the acts complained of amount to negligence. If the doctrine announced in this case is followed, then it will often result that an act will be declared negligent in one state and not negligent in another state under the same law, that is, the federal act. Such discrimination would defeat one of the main objects of the national statute—one uniform rule of liability in all the states where a carrier by railroad is engaged in interstate commerce to its servants while employed in such commerce. It is true that prior to the enactment of the Federal Employers' Liability Act, there was no federal common law; but it has been held by the United States Supreme Court in the *Horton* case, cited, *supra*, that Congress in passing the Federal Employers' Liability Act, adopted the rules and



principles of the common law in determining when a carrier was negligent, under the first section of the act, with the exception that the common law fellow-servant doctrine was abolished. It would seem, therefore, that the decisions of the national courts in construing the national statute should control in determining negligence under the act and in construing and interpreting the common law principles concerning negligence so that there may be one rule of liability under this law, when applicable, in all state courts. Certainly there must be some controlling authority in determining negligence under this act and if these questions are left to be determined according to the admittedly conflicting decisions of the courts of the several states, whose rulings are paramount and exclusive in their own jurisdiction, the question as to when a carrier is negligent under the federal statute would become a matter of the geography of the states and not of a one supreme law applying uniformly within its exclusive domain. Recognizing the inapplicability of state laws in determining negligence under the federal statute, the Kentucky Court of Appeals in another case and also the Georgia Court of Appeals held that a law, providing that upon proof of an accident the presumption of negligence arises, did not control in an action for damages under the federal statute.<sup>18</sup>

The question under consideration is a vital one under the act and it has not apparently been directly

18. *Charleston & W. C. R. Co. v. Brown*, — Ga. —, 79 S. E. 932; *South Covington & C. St. Ry. Co. v. Finan's Adm'x*, 153 Ky. 340.





decided by the Supreme Court of the United States. However, in the case of *Gray v. Southern Ry. Co.*, cited in the notes, the question is discussed at length in the dissenting opinion in the light of the federal decisions. The court in the majority opinion did not apparently deny that the federal decisions controlled but held that under the facts of that case the decisions of the federal and state courts were in harmony and did not conflict. On this question, Judge Brown, in the minority opinion, dissented, but also analyzed and discussed the question of the controlling effect of the federal decisions in determining negligence under the federal act as follows: "In administering the Federal Liability Act, the state courts are bound by the construction and decisions of the federal courts. Since Congress has taken possession of the field of employers' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded. *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062 (6 N. C. C. A. 75n, 95n, 101n, 102n); *Mondou v. Ry. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327 (1 N. C. C. A. 875), 38 L. R. A. (N. S.) 44. Not only have state statutes been made inapplicable, but the common law as well, where a construction has been placed upon it by the state courts differing from that of the federal courts. *South Covington R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742; *W. U. Tel. Co. v. Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815. This subject is elaborately and ably discussed by Mr. Justice Myers of the Su-

preme Court of Indiana and in the recent case of *So. Ry. v. Howerton* (— Ind. —, 6 N. C. C. A. 75n, 82n), 105 N. E. 1026, where all the authorities are collected. Under the law, as applied by the federal courts, the defendant is liable if it could have avoided the injury by the exercise of ordinary care, only after actually discovering the perilous situation. *Little Rock R. & E. Co. v. Billings*, 173 Fed. 903, 98 C. C. A. 467 (5 N. C. C. A. 152, 153n), 31 L. R. A. (N. S.) 1031, 19 Ann. Cas. 1173; note 55 L. R. A., page 424; *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Newport News & M. V. Co. v. Howe*, 52 Fed. 362, 3 C. C. A. 121; *Dunworth v. Grand Trunk Western Ry. Co.*, 127 Fed. 307, 62 C. C. A. 225; *N. Y., N. H. & H. R. v. Kelly*, 93 Fed. 745, 35 C. C. A. 571; *Smith v. R. R. Co.*, 210 Fed. 414, 127 C. C. A. 146. In *Newport News & M. V. Co. v. Howe*, *supra*, the plaintiff was a brakeman on a freight train; the train parted and the engine, with the forward portion of the train, ran some distance ahead before the accident was discovered. The conductor on the rear portion of the train sent Howe ahead with a lantern to signal the engine, and to give the engineer information as to the whereabouts of the rear cars. Howe went forward several hundred yards, sat down on the end of a tie, put his light down near him, and went to sleep with his arm thrown over the rail. The engineer, after running about five miles, discovered the parting, and started back with his engine and tender to take up the rest of the train. The fireman testified that when within a distance of between 100 and 200 feet from the

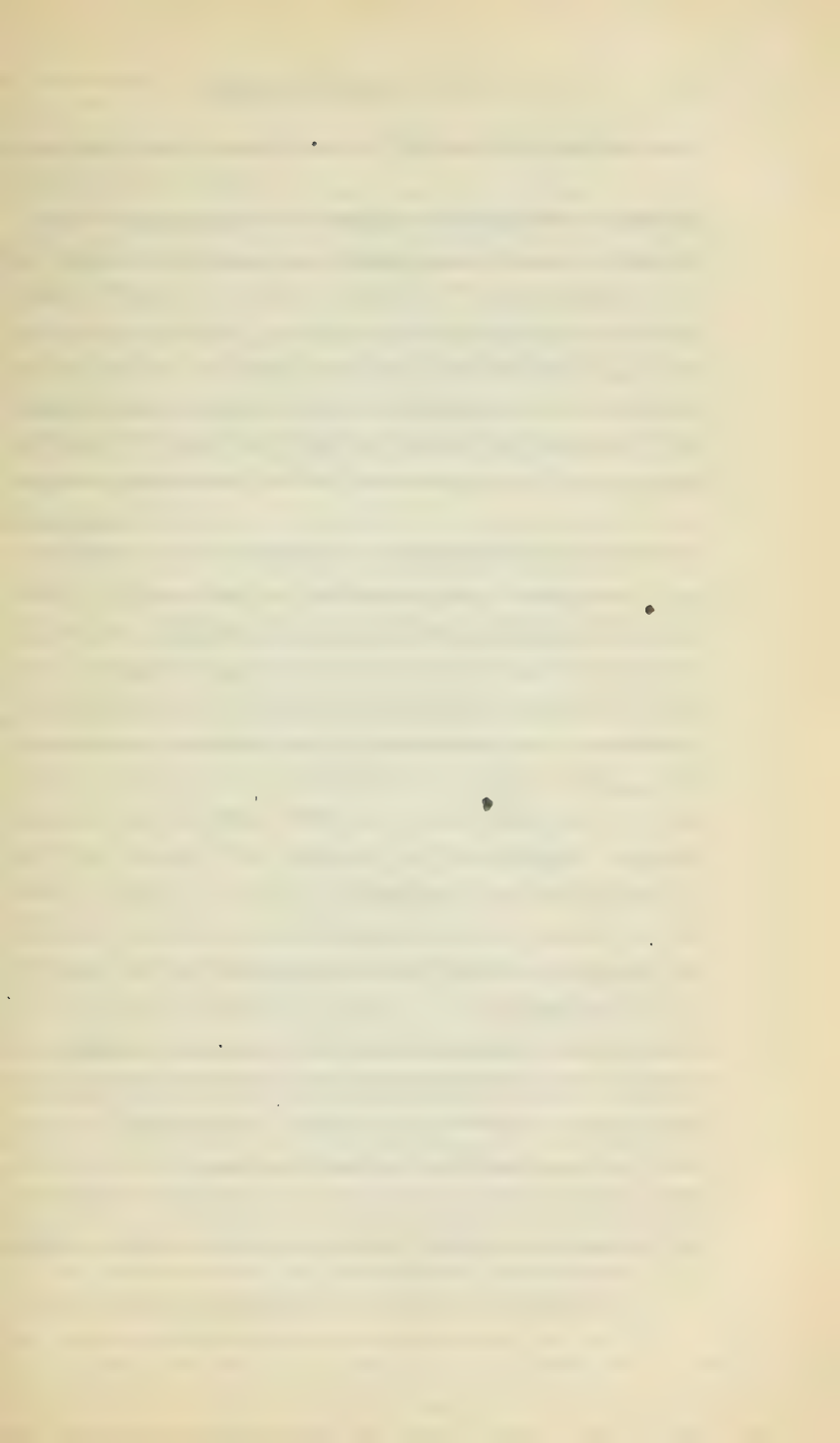


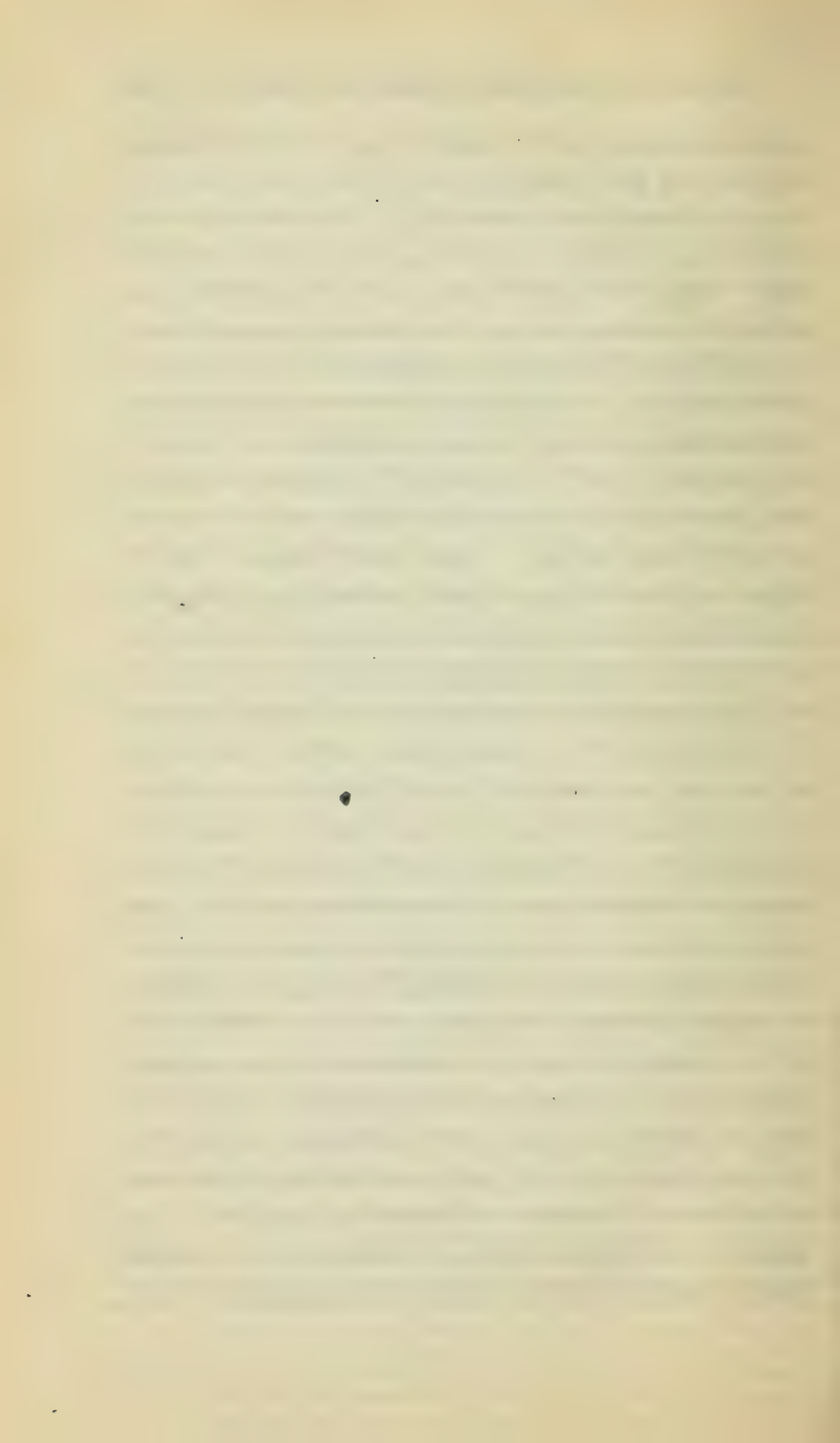




point where Howe lay, he saw the reflection of the light from Howe's lamp. He called to the engineer: 'Look out, there they are'—meaning the rear portion of the train. He looked again and saw on the other side of the track an object which he took to be the brakeman waiting to step on the engine. He crossed to the engineer's side, and then saw the prostrate man only 10 or 15 feet from the approaching engine. He signalled the engineer, who applied the brakes, but was unable to stop before the wheels had passed over Howe's arm and cut it off. A witness, McGuire, testified that the engineer did not look out of the cab window, and that if he looked out, he would have seen Howe, and could have stopped the engine in time to avoid the accident. The rules of the company required the engineer, under these conditions, to signal his return by blowing his whistle at certain intervals, and not to run at a higher speed than four miles per hour. Both of these rules were being violated. Judge Taft, writing the opinion, says: 'While \* \* \* an engineer who fails to keep a sharp lookout upon the track is wanting in due care to passengers and lawful travelers, because of the probability of danger to each from such failure, such conduct is not a want of due care with respect to a man asleep upon the track, because of the presumption, upon which the engineer has a right to rely, that no one would be so grossly negligent in courting death. \* \* \* As applied to a case like the present, therefore, we believe the rule relied on by counsel for plaintiff below should be construed to mean that the negligence of the

plaintiff will be no defense if the defendant, *after he knew the peril of the plaintiff*, did not use due care to avoid it.' This case cites *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, and referring to that case, Judge Taft says: 'This would seem to show that, in the opinion of the Supreme Court, knowledge of plaintiff's peril was required to make the rule applicable.' In *Little Rock, R. & E. Co. v. Billings*, *supra*, the court, composed of Justices Sanborn, Pollock and Van Devanter, the latter of whom is now a justice of the Supreme Court of the United States, said: 'As deduced from the foregoing authorities, and many others that might be cited, this qualification may be stated as follows: A, who by his own negligent act or conduct has placed himself in a position of imminent peril, of which he is either unconscious, or from which he is unable to extricate himself if conscious, may not be carelessly, recklessly, or wantonly injured by B, whom after he has discovered and knows the helpless and perilous condition of A, has it within his power to avoid doing him an injury by the exercise of reasonable care, and diligence in the use of such instrumentalities as he can command; and the failure to exercise such reasonable care and diligence on the part of B, under such circumstances, will constitute actionable negligence, rendering him liable in damages to A, notwithstanding the prior negligent act of A, in placing himself in position to receive the injury.' To my mind, it is quite plain that, in charging the jury upon the measure of the engineer's duty,





the trial judge should have followed the federal and not the state rule.”

**§ 19. Negligence of Human Agencies Not Limited to Fellow Servants as Construed Under Common Law.**—Under the first section of the federal act a carrier by railroad is liable for the negligence of any of its officers or employes and the statute does not confine the negligent acts of employes for which it is liable, to such servants as under the common law were construed to be fellow servants of the injured employe.<sup>19</sup>

In the case of *DeAtley v. Chesapeake & O. Ry. Co.*, cited in the notes, a brakeman on a train carrying interstate shipments was ordered to leave the train at a certain signal tower to get the train orders for the movement of the train and while returning with the orders he attempted in the usual and customary way to get on the train while it was moving, but missed his footing, fell and was injured. In his petition under the federal act he alleged, among other things, that the defendant was negligent in failing to adopt rules requiring all trains to be stopped so that brakemen would not be compelled to get on them while in motion. It was contended by the railroad company that this failure to adopt such a rule was not such a negligent act as was covered by the Employers' Liability Act for the reason that it was not the negligent act of a fellow servant; but the court held that the words in the statute “officers, agents and employes” were not limited to

19. *DeAtley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591.

fellow servants as construed under the common law doctrines, but included any and all agents or officers of the company whose duty it was to adopt and promulgate rules governing the operation of trains. The court said: "It (defendant) can only act through officers, agents and employes and the failure to look after such condition properly is necessarily negligence on the part of officers, agents and employes to whom it has intrusted the duty of looking thereafter. The two classes seem, therefore, to overlap, but I do not think that one is justified in limiting the language of the first class to prevent overlapping, which would be done by limiting the first class to the negligence of servants for which the common carrier is not liable at common law, leaving the second class to cover the negligence of servants for whom it is in such cases as it covers.

\* \* \* It seems to me that it was the intent and purpose of the act to cover every negligence for which a common carrier engaged in interstate commerce might be liable to its employes in such commerce."

**§ 20. Statute Covers Negligent Act of Intrastate Employes and Defects in Instrumentalities Used Solely in Intrastate Commerce.**—It is not essential, to permit a recovery under the national act, that the employe whose negligence caused the injury be also employed in interstate commerce or that the instrumentality, the defect in which caused the injury, be used at the time in interstate commerce. Instances where the causal negligence is that of a coemploye engaged at the time solely in intrastate commerce or







where the instrumentality causing the injury was used at the time exclusively in intrastate commerce, are embraced within the terms of the act, if the other conditions are present, that is, if the carrier was engaged in interstate commerce and if the injured employe at the time was employed in interstate commerce.

The statute gives a right of recovery under such conditions for injury or death resulting from the negligence of *any* of the employes.<sup>20</sup> In the *Pederson* case, cited in the notes, the court said: "But it is not essential where the causal negligence is that of a coemploye that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence 'of any of the employes of such carrier' and this includes an employe engaged in intrastate commerce."

An appellate court in New Jersey rendered an erroneous decision on the question of applicability of the federal act which was due in part to a failure to recognize this principle.<sup>21</sup> In that case the plaintiff was injured while placing a cover over the mechanism of a switch which he had just oiled. The switch connected with tracks used indiscriminately in moving both kinds of commerce. While so engaged the plaintiff was struck by a car used at the time solely

20. *Mondou v. New York, N. H. & H. R. Co.*, Second Employers' Liability Cases, 223 U. S. 1, 56, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n; *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832.

21. *Granger v. Pennsylvania R. Co.*, — N. J. —, 86 Atl. 264.

in intrastate commerce. It was held that there could be no recovery under the federal act for two reasons, one of them given by the court was that the car was not used in interstate commerce. This ruling was erroneous for it is immaterial whether the instrumentality which caused the injury was at the time being used in interstate commerce.

In a case which has been very frequently cited the rule on this feature is clearly stated as follows: "I am therefore of the opinion that the plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this act. (Plaintiff was repairing a switch on tracks used indiscriminately for both kinds of commerce.) That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes every activity when they are engaging in such commerce by their own employes. In short, if the employe was engaged in such commerce, so was the road, for the road was the master and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction." <sup>22</sup>

**§.21. Negligence Need Not Be Proven when Violation of Federal Safety Appliance Act Is Cause of Injury.**—In any action under the Federal Employers' Liability Act, where the cause of the injury or

22. *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.





death is shown to have been due to any violation of the several sections of the Federal Safety Appliance Act, the plaintiff is not required to show negligence, for, as now construed by the courts, the Federal Safety Appliance Act imposes an absolute duty upon the carrier to comply with the terms thereof in the equipment of its cars, and if any failure to comply with the law causes injury or death, the carrier is absolutely and unconditionally liable for the resulting injury without regard to the question whether the defect was or was not due to negligence or could have been discovered by reasonable diligence. In other words, the carrier is liable if any violation of the Federal Safety Appliance Act causes injury even though the defect could have been prevented by any degree of diligence. That law does away with the common law rule making liability depend upon negligence and makes the carrier absolutely liable for any injury resulting from the use of a car not equipped as provided by that act or by the orders of the Interstate Commerce Commission, made pursuant to the authority therein delegated to that body. In one case, Mr. Justice Moody, speaking for the Supreme Court, said: "If the railroad company itself in point of fact, use cars which do not comply with the standard, it violates plain prohibitions of the law and there arises from that violation the liability to make compensation to one who is injured by it." <sup>23</sup>

23. St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. Ed. 582; Brinkmeier v. Missouri P. Ry. Co., 81 Kan. 101; s. c., 224 U. S. 268, 56 L. Ed. 758, 3 N. C. C. A. 795n; Atlantic C. L. Ry.

## § 22. Applicability of Doctrine of *Res Ipsa Loquitur* Under Federal Act—Conflicting Rulings.—

Whether the doctrine of *res ipsa loquitur* is applicable in an action for damages under the federal act where the particular facts of a case permit the application of such a rule of evidence under the general law, has been the source of conflicting decisions. The supreme courts of Minnesota and North Carolina have held in actions of negligence between master and servant under the federal act that the doctrine under the usual and proper evidenciary circumstances applies.<sup>24</sup> On the other hand the Federal Circuit Court of Appeals for the Eighth Circuit decided that the doctrine of *res ipsa loquitur* was not applicable in actions by employes against carriers by railroad under the federal act.<sup>25</sup> The decision of the court in the Fulgham case, cited in the notes, was based upon former decisions of other national courts including the Supreme Court of the United States in actions of general negligence but not under the Federal Employers' Liability Act. The national courts prior to the passage of the Federal Act had uniformly held that the evidential rule

Co. v. United States, 94 C. C. A. 35, 168 Fed. 175; United States v. Atchison, T. & S. F. Ry. Co., 90 C. C. A. 327, 163 Fed. 517; Chicago, R. I. & P. Ry. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1204, 3 N. C. C. A. 826, affirming the same case reported in 107 C. C. A. 300, 185 Fed. 80, which affirmed the same case reported in 183 Fed. 80; Wisconsin v. Chicago, M. & St. P. Ry. Co., 136 Wis. 407.

24. Wiles v. Great N. Ry. Co., 125 Minn. 348, 5 N. C. C. A. 60; Ridge v. Norfolk S. Ry. Co., — N. C. —, 83 S. E. 762.

25. Midland V. R. Co. v. Fulgham, 104 C. C. A. 151, 181 Fed. 91.







of *res ipsa loquitur* was not applicable in actions for negligence between master and servant.<sup>26</sup>

In a very recent case under the Federal Employers' Liability Act taken to the United States Supreme Court by writ of error from the Supreme Court of South Carolina there is in the language of the court in affirming the case an equivocal statement as to the applicability of the *res ipsa loquitur* rule.<sup>27</sup> The language of the court is as follows: "The defendant was killed by the falling of his engine through a burning trestle bridge. There was evidence tending to show that the trestle was more or less rotten, that the fire was caused by the dropping of coals from an earlier train and that the engine might have been stopped had a proper lookout been kept. The first complaint is against an instruction to the effect that, if a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence and that the master 'assumes the burden' of showing that he exercised due care in furnishing them. Of course the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality and no

26. *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 45 L. Ed. 362, 5 N. C. C. A. 43n; *Chicago & N. W. R. Co. v. O'Brien*, 67 C. C. A. 421, 132 Fed. 593; *Northern P. Ry. Co. v. Dixon*, 139 Fed. 737; *Hamilton v. Kansas C. S. R. Co.*, 123 Mo. App. 619.

27. *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 58 L. Ed. 860, affirming the same case reported in — S. C. —, 79 S. E. 710,

explanation was given, the plaintiff had sustained the burden. The instruction is criticised further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to. The judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use care to keep in order and which usually would be in order if due care was taken, was *prima facie* evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ash pan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury. We should not reverse the judgment on this ground, even if an objection was open to an isolated phrase to which no attention was called at the time.”

**§ 23. Cases Under Federal Act in Which the Facts Were Held to Show Actionable Negligence.**—In the following actions for damages under the federal act it was held that the facts summarized warranted an inference of negligence sufficient to submit the question to a jury. A railroad bridge which had been weakened because some of the wooden supports under it had been consumed by fire collapsed when an engine attached to a rotary snow plow passed over it, causing the death of the engineer. The defendant's negligence was held to be a jury question.<sup>28</sup> Decedent, a switchman in the employ of a

28. *Copper R. & N. W. Ry. Co. v. Reed*, (C. C. A.) 211 Fed. 111.





railroad company while engaged in making up an interstate train, was run over and killed by a "road" engine used at the time in switching. This engine was equipped with a pilot and did not have a front footboard with which regular switch engines in railroad yards are usually equipped. Decedent fell from the pilot of the "road" engine and the evidence disclosed that there would have been less danger for employes if the engine had been equipped with a footboard. The court held that it was a question for the jury to determine whether the railroad company was negligent in using the "road" engine instead of a regular switch engine.<sup>29</sup> A conductor of freight train was killed in a rear-end collision. One of the brakemen working under him neglected to protect the rear of the train by going back a certain distance to flag approaching trains as he was required to do. It was held that the brakeman's negligence, as a matter of law, was the defendant's negligence.<sup>30</sup> A gang of track laborers were returning from their work on several handcars which were a short distance apart. One of these cars on which plaintiff was riding collided with the car just ahead of it, causing plaintiff's injuries. It was shown that the men on the car in front of plaintiff's car without any warning suddenly materially reduced the speed of their car and the collision followed. The court held that the question whether the defendant's employes on the first car were negligent was properly

29. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321, 6 N. C. C. A. 86n, 106n.

30. *Pennsylvania Ry. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.



a question for the jury.<sup>31</sup> Whether a railroad company was negligent in failing to inspect a box car after the roof was blown off and before the said condition of the box car caused an injury to an employe, was properly submitted to a jury for determination.<sup>32</sup> Plaintiff was assisting in repairing a railroad bridge by preparing the points and heads of pilings so that they might be driven with a pile-driver. He attached a rope to a pile so that it might be hoisted by the pile-driver and moved into the place where it was to be driven. Plaintiff then crossed to the other side of the track when the pile, in being raised, swung over and struck him. There was evidence tending to show that if the engineer operating the pile-driver engine had held the line as it was his duty to do, the piling would have swung across from one side of the track to the other high enough to avoid hitting the plaintiff. The question of the engineer's negligence was properly submitted to the jury.<sup>33</sup> A section hand, while sweeping snow from the switches of a main line on a cold, windy, dark night, was struck and killed by a train running at a speed of 35 miles an hour without the bell ringing or whistling except that the whistle was blown at the whistling post before reaching the station. The track at the point was straight and the engine had a headlight which would show objects for a distance of 1,000 feet. The men in charge of the train

31. *San Pedro, L. A. & S. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870, 6 N. C. C. A. 197n.

32. *Ridge v. Norfolk S. Ry. Co.*, — N. C. —, 83 S. E. 762.

33. *Smith v. Northern P. R. Co.*, — Wash. —, 5 N. C. C. A. 947, 6 N. C. C. A. 85n, 92n, 140 Pac. 685.





knew that on such nights section men worked at switches to keep them clear of snow. The court held that on the question of the defendant's negligence the cause was properly submitted to the jury.<sup>34</sup> A large number of boxes had been standing for several weeks on a platform within a foot of a passing car. A passenger train passed by this platform and the steps attached to the side of the baggage car were torn away by striking some of these boxes which had toppled over a few hours before. Shortly thereafter the baggageman on the train as it approached another station, fell to the ground because of the absence of the steps. In leaving the boxes unsecured so that they might cause damage to a passing train, the court held that the defendant was guilty of actionable negligence under the federal act.<sup>35</sup> A passenger train stopped at night on a trestle bridge which was floored on one side of the track but not on the other. The train porter on the command of the conductor who knew the condition of the trestle, stepped from the train on the side that was not floored, fell several feet to the ground and was injured. He had been ordered by the conductor to get off the train in order to carry an oil can to the engineer. The porter was ignorant of the condition of the bridge. The court held that the conductor as the agent of the defendant was negligent in failing to inform the porter as to the proper side of the bridge for him to alight and that said neg-

34. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156.

35. *Ferebee v. Norfolk S. Ry. Co.*, — N. C. —, 4 N. C. C. A. 220n, 79 S. E. 685.

ligence, under the federal act, was the proximate cause of the injury.<sup>36</sup> A petition in an action under the federal act stated that the plaintiff was a fireman on an interstate train; that as the train approached close to a place where the track had been torn up for repairs, a flagman, one of the laborers on the track, ran excitedly towards the train and signaled the engineer to stop. The emergency brakes were quickly applied and the plaintiff, seeing the flagman and the track torn up, jumped from the engine and was injured. It was alleged that the plaintiff's injuries were caused by the negligence of the defendant in failing to have a flagman a sufficient distance away from where the employes were working on the track so that the train could be stopped before reaching the point. The petition was held to state a good cause of action under the federal act.<sup>37</sup> A bridge carpenter was at work on a double track bridge within fifty feet of a curved tunnel on the west and on the east approach there was another curve in a cut. The foreman took no precaution to protect the workmen by sending out flagmen. He only stood on the east bound track and called "railroad" or "clean up" on observing the approach of a train. It was held that the company was guilty of negligence under the federal act in failing to protect the bridge carpenters with flags.<sup>38</sup> Whether a railroad company was negligent in failing to illumi-

36. *Missouri, K. & T. Ry. Co. v. Bunkley*, — Tex. Civ. App. —, 5 N. C. C. A. 583n, 153 S. W. 937.

37. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744.

38. *Norfolk & W. R. Co. v. Holbrook*, 215 Fed. 687; s. c., (C. C. A.), 215 Fed. 1007, reversed on other grounds by United States Supreme







nate and guard an opening in a platform tunnel, was held, in an action under the federal act, under the evidence to be a question for the jury.<sup>39</sup> A switchman, while walking along a track in a terminal railroad yard at night, was struck and killed by an engine moving slowly and almost noiselessly in the same direction. The engine's headlight was very dim and a train on another track nearby was passing at the same time making considerable noise. The engine which struck the switchman could have been stopped within a few feet but the engineer did not see the decedent. It was held that these facts constituted sufficient evidence of negligence and a verdict for the plaintiff was affirmed.<sup>40</sup> Whether a cinder pile placed near a track in a railroad yard constituted a "defect due to negligence" within the meaning of the federal act, was a question for the jury to pass upon.<sup>41</sup> A railroad employe, while riding on the side of a box car at night, struck a switch stand and was injured. In a subsequent action for damages under the federal act, the court held that the question of the defendant's negligence in maintaining the switch stand too close to the track was, under the evidence, a matter for the jury to determine.<sup>42</sup> An engineer in stopping a train and causing such an unusual and sudden jolt as to throw an

Court (January 5, 1915), 235 U. S. 625, 59 L. Ed. —. See § 88, *infra*.

39. Copper River N. W. Ry. Co. v. Henney (C. C. A.), 211 Fed. 459.

40. Southern Ry. Co. v. Smith, 123 C. C. A. 488, 205 Fed. 360.

41. Southern Ry. Co. v. Jacobs, — Va. —, 6 N. C. C. A. 94n, 186n, 81 S. E. 99.

42. McDonald v. Railway T. Co., 121 Minn. 273.

employee from a ladder on a side of a car was guilty of negligence under the federal act.<sup>43</sup> When a railroad company caused some cars to be "kicked" at night without warning and without light along a track in a terminal yard, its negligence in so doing was a jury question.<sup>44</sup> A brakeman, while switching cars from a train to a side track at night and riding on the side of a box car, was struck and injured by other cars standing on the adjoining track which had not been shoved far enough from the switch to be "in the clear." The brakeman knew of the presence of the standing cars but did not know how far they had been placed from the switch joining the two tracks. He proceeded to investigate before making the switching movement but before ascertaining the condition of the cars he was assured by a fellow brakeman that the standing cars could be passed with safety and relying upon this assurance, he proceeded with the switching movement and was injured by coming in contact with the cars. In an action under the federal act it was held that his fellow brakeman's statement constituted actionable negligence.<sup>45</sup> A switchman while assisting in "poling" a car, was crushed to death between the engine and the car. There was evidence *pro* and *con* as to the proper method in such movements of cars.

43. *LaMere v. Railway T. Co.*, 125 Minn. 526, 6 N. C. C. A. 97n, 100n; *Fort Worth & D. C. Ry. Co. v. Staleup*, — Tex. Civ. App. —, 167 S. W. 279; *Owens v. Chicago G. W. R. Co.*, 133 Minn. 49; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 6 N. C. C. A. 75n, 438n, 439n.

44. *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832; s. c., 113 C. C. A. 379, 192 Fed. 901.

45. *Skaggs v. Illinois C. R. Co.*, 124 Minn. 503.





Whether the method actually used by direction of the foreman was negligent and caused the death of the decedent, was held, under the evidence, to be a jury question.<sup>46</sup> A track laborer taking out old ties from the main line when a train approached on that track, stepped on an adjoining track where he was struck and killed by a switch engine which approached without any warning. Witnesses testified that it was customary for switching crews to give warning to track laborers. It was held that the question of the negligence of the employes in charge of the switch engine was properly submitted to the jury.<sup>47</sup> A glass attached to a lubricator on an engine exploded and blew the shield around it against an engineer's face causing the loss of an eye. The lubricator in question was a kind called "Nathan" which sometimes explodes. Seventy-five per cent of the defendant's engines were equipped with a kind of lubricator known as "Bull's Eye" which did not explode. The "Nathan" lubricators had been in use for twenty years but for three years before the date of plaintiff's injury this kind had been replaced on most of the engines by the "Bull's Eye" lubricators. Whether the defendant committed a negligent act in continuing to furnish the engine on which plaintiff was working with a "Nathan" lubricator instead of a "Bull's Eye," was a question for the

46. *Sweet v. Chicago & N. W. Ry. Co.*, 157 Wis. 400, 6 N. C. C. A. 78n, 94n, 232n, 451n.

47. *Bombolis v. Minneapolis & St. L. R. Co.*, — Minn. —, 150 N. W. 385.

jury.<sup>48</sup> A car foreman while on duty had the exclusive possession of certain keys which unlocked the switches of a certain repair track in a terminal yard. Decedent, a car repairer, while working on this track was ordered by the foreman to go to another track in the yard to make slight repairs to a car. While he was absent the foreman ordered the switching crew to take out some cars from the repair track and place others in there for repair. Having no knowledge of the foreman's order or that cars were being switched onto the repair track, the car repairer returned and while at work on a car standing on the repair track, the car was struck by other cars shoved in on the repair track by the switching crew causing the death of the car repairer. It was held that whether the foreman was negligent in failing to anticipate that the car repairer would return before the switching was completed and in failing to warn the decedent, was not a question of law but a question of fact to be solved by the jury.<sup>49</sup> A railroad employe was ordered by the conductor to couple an engine to a way car. Upon the first effort, the coupling failed. The way car was knocked back some distance. The deceased stepped in to fix the pins and then signaled the fireman to couple up, but the caboose again failed to make the coupling. The deceased again stepped in to adjust the coupling and while standing near the draw bar the caboose sud-

48. *Bower v. Chicago & N. W. Ry. Co.*, — Neb. —, 6 N. C. C. A. 213n, 148 N. W. 145.

49. *Evans v. Detroit, G. H. & M. Ry. Co.*, — Mich —, 148 N. W. 490.







denly moved down upon him, causing his death. It was held that the evidence was sufficient to show a violation of the Federal Safety Appliance Act and that such violation caused his death.<sup>50</sup> Decedent, a car inspector, was run over and killed at night on a track in a railroad terminal yard by some cars backed up by a switch engine without warning, without lights and with no one on the end of the first car to warn him of danger. In an action under the federal act it was held that the question of the defendant's negligence was properly submitted to the jury.<sup>51</sup> A section laborer in a railroad yard stepped on a certain track for purposes of his own, the evidence being conflicting as to whether he was between two cars or at the end of a car standing on the track. While so standing he was struck by some cars switched upon the track. There was evidence that there was no one on these cars in a suitable position to warn employes of their approach and there was also evidence that the section foreman knew that the laborer was in a position of danger on the track and that he by exercising ordinary care could have seen the approaching cars in time to have warned the decedent. It was held under these facts that the cause was properly submitted to the jury under the federal act.<sup>52</sup>

50. *Montgomery v. Carolina & N. W. R. Co.*, 163 N. C. 597, 6 N. C. C. A. 88n.

51. *Thornton v. Seaboard A. L. Ry. Co.*, — S. C. —, 6 N. C. C. A. 85n, 93n, 82 S. E. 433.

52. *Louisville & N. R. Co. v. Johnson's Adm'x*, — Ky. —, 171 S. W. 847.

§ 24. **Cases Under Federal Act in Which the Facts Were Held Not to Show Actionable Negligence.**—An electric passenger car while running from one state to another was derailed in the state of Ohio causing the death of the motorman. Under a statute of Ohio proof of a defect in the wheels of the car was sufficient to create a *prima facie* case of negligence but as the action was prosecuted under the federal act the state statute was inoperative for the reason that under the federal act a common carrier by railroad is not liable unless the death is the result of defects “due to negligence” and a recovery was denied.<sup>53</sup> An engine repairer in a roundhouse had his hand crushed between a pilot beam and a jack while attempting to lower the front end of a locomotive engine. He claimed that the engine dropped because another jack on the other side of the engine slipped and that this in turn was due to the fact that a wrench was used as a substitute for a lever. The court held that, under the evidence, the plaintiff failed to show that an act of negligence caused the injury.<sup>54</sup> A fireman on an engine saw a track walker walking in a place of safety between two tracks with his back to the train. The engine bell was ringing; but as the train came close to the track walker, he suddenly stepped from between the tracks on the track on which the train was approaching and was run over and killed. He could not have been seen by the engineer because of a curve. A jury returned a verdict

53. *South Covington & C. St. R. Co. v. Finan's Adm'rs*, 153 Ky. 340.

54. *Winters v. Minneapolis & St. L. R. Co.*, — Minn. —, 6 N. C. C. A. 78n, 201n, 148 N. W. 106.





against the railroad company and found that the death of the track walker was due in part to the negligence of the fireman in failing to request the engineer to sound the whistle when the decedent was first seen by the fireman while walking between the tracks. It was held that the fireman was not negligent in failing to anticipate that the decedent would step from a place of safety on a track directly in front of an approaching train and the cause was reversed.<sup>55</sup> Plaintiff, a student fireman, was given a letter by the defendant railroad company permitting him to ride on the engines of all freight trains to prepare himself for the duties of a fireman. He boarded an engine of one train and was informed by the fireman that it was not a suitable train to learn firing on and he was advised to get off and then get on another train running in the opposite direction at a certain place over which all trains ran under "slow orders." He was told that the train would pass that place running only six miles an hour and that he could easily get on. The plaintiff did so and in attempting to get on the other train was thrown under the wheels and injured. He attributed his injuries to the excessive speed of the train of which he had no knowledge, but assumed, on the assurance of the fireman of the other train, that it was only running at the rate of six miles per hour. He had had no experience in judging the speed of train. The court held that there was no duty towards the plaintiff to run the train at six miles an hour and

<sup>55</sup>. *New York, N. H. & H. R. Co. v. Portillo* (C. C. A.), 211 Fed. 331.

consequently no negligence.<sup>56</sup> Plaintiff, a section foreman, was riding with a force of men on a hand car while inspecting the tracks. A flagman had preceded the section hands along the track so as to give them warnings of approaching trains. Suddenly a freight train running at a high rate of speed came in sight from around a curve and the flagman promptly warned the men on the handcar. Because of the close proximity of the train when it was discovered, owing to the curve which obstructed the view, the men on the handcar acted promptly, and to prevent a threatened collision quickly removed the car. The plaintiff in assisting strained himself and sustained injuries. The court found that under the facts neither the flagmen or the train employees were negligent and that as it was necessary for the plaintiff in an action under the federal act to show by the evidence that his injuries were caused in whole or in part by the defendant's negligence or its employees, there was no liability.<sup>57</sup> Two section men, each holding one end of a tie, started to toss the tie on a flat car. The tie was in a wet, slippery condition and this caused it to turn as it was being tossed on the car. One of the two laborers, by reason of the tie slipping and turning, had his finger caught between the tie and the floor of the car, causing it to be pinched off. In a subsequent action under the federal act, it was held that the facts disclosed did

56. *Cincinnati, N. O. & T. P. Ry. Co. v. Wheeler*, — Ky. —, 169 S. W. 690.

57. *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 6 N. C. C. A. 75n, 196n.







not show negligence within the meaning of the act, but that the plaintiff's injury was due to an accident without any causal negligence contributing.<sup>58</sup> Steam escaped from a steam pipe attached to a steam chest on a ferry boat used by a railroad company as a part of its line. The escaping steam caused the death of an employe on the boat and it was held in an action for his death by the administrator on behalf of the beneficiaries named in the federal act that as there was no evidence produced tending to show that the escape of the steam and the breaking of the pipe was due to some negligence on the part of the owner, there could be no recovery.<sup>59</sup> A brakeman while switching cars at night and knowing that cars were being shoved back in response to his signal to the engineer, placed himself between the track on which the cars were approaching and a freight loading platform where the space between the platform and a car was only a few inches and too narrow for a man to stand with safety. While the cars were still about twenty feet away from him, the conductor warned him of the dangerous place he was in and told him to get out. Then the brakeman set his lantern on the platform, placed his hands upon the platform and tried to vault onto the platform but before he succeeded the end of the car caught him and crushed him between the car and the platform. It was held that no negligence of the defendant contributed either in whole or in part to cause the

58. *Long v. Southern Ry. Co.*, — Ky. —, 159 S. W. 779.

59. *The Passaic*, 190 Fed. 644; s. c., 122 C. C. A. 466, 204 Fed. 266.

death.<sup>60</sup> A conductor was walking along the side of his train taking the numbers of the cars while the crew was making up the train. Starting at the rear of the train there were first, three cars; second, a space of 18 or 20 feet; third, three more cars; fourth, a space of several feet, and, fifth, a long string of freight cars with the engine at their head. When the conductor reached the rear of the forward three cars, he gave the lift pin lever a jerk, and then reached in to put his hand on, or actually took hold of the coupler when the forward end of the train struck the forward end of the three cars in the act of coupling to them, knocked him down and ran over him. The car to which the coupler was attached had been inspected shortly before the accident and the inspectors had found no defect. Several witnesses examined and operated the coupler and the lift pin lever immediately after the accident and found them in good condition and operating perfectly. It was held that under this state of facts the verdict of the jury that the coupler was so defective at the time of the accident that "it would not couple automatically by impact without the necessity of men going in between the car" as required by the Federal Safety Appliance Act, was based on conjecture and could not be sustained.<sup>61</sup> A section hand was riding on a tricycle on a railroad track with his foreman. Tools were also being carried. The foreman ordered the laborer to stop the car with the brake and when

60. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185.

61. *Midland V. R. Co. v. Fulgham*, 104 C. C. A. 151, 181 Fed. 91, reversing the same case reported in 167 Fed. 660.





he attempted to do this with his hand, his arm came in contact with the tools on the car causing his fingers, in some way not clearly shown, to be caught in the cog wheels, injuring him. It was claimed in a suit under the federal act that the foreman was negligent in ordering the laborer to apply the brakes as in doing so he might probably come in contact with the tools and be injured. The court held that such an act on the part of a foreman was not negligence and that the injury was caused by an accident without any negligence contributing thereto.<sup>62</sup>

**§ 25. Wilful Wrongs Not Within Terms of the Act.**

—By its terms the national act is limited to negligent acts of a common carrier. Under well-known principles of law, injuries caused by the wilful or intentional acts of another are not within the terms of the statute, for, as quaintly said by one jurist, “when wilfulness comes in at the door negligence goes out through the window.” Most statutes, giving rights of action for death, define the wrongful act as the “wrongful act, neglect or default of another” which would include intentional wrongs; but the federal act, for some reason, has confined the wrongful acts for which a recovery can be had, to those which are due to negligence solely. A wilful assault of one employe upon another would be beyond the terms of the statute.

62. Cincinnati, N. O. & T. P. Ry. Co. v. Hill, — Ky. —, 170 S. W. 599.



## CHAPTER III

### EMPLOYES INCLUDED WITHIN THE FEDERAL ACT

- § 26. Statute Includes Only Employees Injured While Engaged in Interstate Commerce.
- § 27. Servants Engaged in Both Kinds of Commerce.
- § 28. Train Men on Interstate Trains Are Employed in Interstate Commerce.
- § 29. When Train Men Are Not Engaged in Interstate Commerce.
- § 30. Bridge Workers and Carpenters Employed in Interstate Commerce, When.
- § 31. When Car Repairers and Roundhouse Employees Are Engaged in Interstate Commerce.
- § 32. When Car and Engine Repairers Are Not Engaged in Interstate Commerce.
- § 33. Test in Determining When Switching Crews Are Engaged in Interstate Commerce.
- § 34. Switching Crews Engaged in Interstate Commerce.
- § 35. Switching Cars Containing Intrastate Shipments Into or Out of Interstate Trains—Conflicting Rulings.
- § 36. Section Men and Track Laborers. |
- § 37. Employees Preparing or Moving Materials or Instrumentalities to Be Used on Interstate Trains.
- § 38. Employees Preparing Interstate Trains for Movement.
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- § 40. Employees Engaged in the Original Construction of Instrumentalities for Future Use in Interstate Commerce Not Within the Act.
- § 41. Repairing or Rebuilding Instrumentalities Used in Interstate Commerce.
- § 42. Yard Clerks Engaged in Interstate Commerce, When.
- § 43. Pullman Employees.
- § 44. Agents of Express Companies.
- § 45. Miscellaneous Employees.
- § 46. Instances Where Employees Were Engaged in Interstate Commerce but Erroneously Held to Have Been Engaged in Intrastate Commerce.





- § 47. Instances Where Employees Were Engaged Exclusively in Intrastate Commerce but Erroneously Held by the Courts to Have Been Engaged in Interstate Commerce.
- § 48. Employees Presumed to Be Engaged in Intrastate Commerce.
- § 49. Intrastate Employees Injured by Negligence of Interstate Employees or Instrumentalities of Interstate Commerce Have No Remedy Under Federal Act.
- § 50. Decisions Construing Federal Safety Act Not Always Applicable in Construing Employers' Liability Act.
- § 51. When Question of Employment in Interstate Commerce Should Be Submitted to Jury.

**§ 26. Statute Includes Only Employees Injured While Engaged in Interstate Commerce.**—The statute provides that a common carrier by rail, while engaging in interstate commerce, is liable for injuries or death to an employe, due to negligence, "while he is employed by such carrier in such commerce." The employe must have been at the time of the injury engaged in interstate commerce. Frequently a troublesome question arises as to whether a servant is employed in interstate or intrastate commerce at the time of the accident, for, if the former, the remedy, if any, given by the federal act is exclusive, while if the latter, the state law alone furnishes the remedy, even though at the time the carrier itself was engaged in interstate commerce. Both must be so engaged to render the federal act applicable. If the reader bears in mind that Congress in passing the act, was not regulating the rights and liabilities of employers and employes *as such*, but was primarily regulating and promoting the safety of those engaged in interstate commerce, and for that purpose incidentally declared the rights and liabilities of all railroads and employes only.

while both were engaged in such commerce, many difficulties in the solution of such a question disappear.<sup>1</sup>

**§ 27. Servants Engaged in Both Kinds of Commerce.**—Although an employe is at the time engaged in intrastate commerce as well as interstate commerce, as, for instance, an employe on a train hauling both kinds of commerce or a carpenter repairing a bridge over which both kinds of commerce, are carried, yet if injured under such circumstances, he cannot take his choice of remedy under the state and federal law, for the courts hold that he is then engaged in interstate commerce and the remedy given by the national act is exclusive.<sup>2</sup> An extreme and a proper application of this principle is the following: A brakeman injured on a train containing nothing but intrastate shipments has no remedy under the federal act but the minute that any specie of merchandise destined to a point beyond the state is placed in that train, then if the brakeman on that train is injured, he is engaged in interstate com-

1. First Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, in which the Supreme Court declared the Federal Employers' Liability Act of 1906 unconstitutional; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44, in which the Federal Employers' Liability Act of 1908 was held constitutional and valid.

2. Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, reversing same case in 117 C. C. A. 33, 197 Fed. 537, which affirmed 184 Fed. 737; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n; Fernetto v. Pere Marquette R. Co., 175 Mich. 653, 6 N. C. C. A. 231n.







merce, although every other commodity in that train is a shipment between two points in the same state.<sup>3</sup>

**§ 28. Train Men on Interstate Trains are Employed in Interstate Commerce.**—Engineers, firemen, conductors, brakemen, flagmen and other employes working on interstate trains are employed in interstate commerce within the meaning of the act. A brakeman killed while helping to move an interstate train, was held to be engaged in interstate commerce.<sup>4</sup> Employes of a common carrier by railroad on a train transporting freight from one station on a railway line to another station in the same state where the freight was to be transported by other trains to another state, were engaged in interstate commerce within the meaning of the federal act.<sup>5</sup> A brakeman employed on a train running between two terminals in the same state which contained cars destined for points in other states and injured while uncoupling two cars, was engaged in interstate commerce.<sup>6</sup> A fireman on an engine of a passenger train running from Chicago to Milwaukee and injured in Illinois was employed in interstate com-

3. *United States v. Colorado & N. W. Ry. Co.*, 85 C. C. A. 27, 157 Fed. 342, 15 L. R. A. (N. S.) 167n, 13 Ann. Cas. 893. Decedent was brakeman with a switching crew in a freight yard. He was killed while switching cars. The evidence was silent as to whether the cars contained interstate shipments. It was held that his widow suing as administratrix could not recover under the Federal Act. *Hench v. Pennsylvania R. Co.*, — Pa. —, 91 Atl. 1056.

4. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 6 N. C. C. A. 75n, 438n, 439n; *Hearst v. St. Louis, I. M. & S. Ry. Co.*, — Mo. App. —, 173 S. W. 86.

5. *United States v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 624.

6. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 6 N. C. C. A. 99n, 105n, 186n.

merce.<sup>7</sup> An engineer on a freight train running from a point in Missouri to another place in Arkansas and killed while enroute was held to have been employed in interstate commerce.<sup>8</sup> Although a freight train was only operated between two terminals in the same state, yet since it transported freight from one state to another and to a foreign country, the employes on the train were engaged in interstate commerce.<sup>9</sup> A brakeman on a passenger train running from a point in Kentucky to another point in Ohio, was held to be engaged in interstate commerce.<sup>10</sup>

**§ 29. When Trainmen Are Not Engaged in Interstate Commerce.**—If, at the time of the accident, the injured employe was engaged in intrastate commerce, his remedy is governed exclusively by the laws of the state where the accident occurred. Trainmen, such as engineers, firemen, flagmen, baggagemen, brakemen, porters and conductors, are not employed in interstate commerce when they are assisting exclusively in the movement of intrastate traffic. For instance, when they are employed on a train containing only traffic billed between two points in one state, the line between the two points being wholly within the state, they are engaged in intrastate commerce. As a matter of fact, however, in the practical operation of railroads, trains running

7. *Rowlands v. Chicago & N. W. Ry. Co.*, 149 Wis. 51.

8. *St. Louis, I. M. & S. Ry. Co. v. Conley*, 110 C. C. A. 97, 187 Fed. 949.

9. *Northern P. Ry. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237, reversing same case reported in 53 Wash. 673.

10. *Cincinnati, N. O. & T. P. Ry. Co. v. Goode*, 155 Ky. 153, 6 N. C. C. A. 81n, 544n; s. c., 153 Ky. 247.





between two terminals, containing only intrastate commerce, that is, traffic originating in and being destined to a point in the same state, are seldom operated as the examination of conductors' wheel reports will disclose, and, as a rule, every train carries interstate freight. If a train has a single shipment of interstate freight, then all the employes working on that train are engaged in interstate commerce.

Notwithstanding trains as a rule carry interstate commerce, cases have been passed upon, in which the courts have held, and properly so, that the employe's remedy was governed exclusively by the state law, because of the fact that the train on which he was working contained only intrastate shipments.<sup>11</sup> For instance, a switching crew for a railroad company worked sometimes during the day in transporting interstate shipments and at other times in hauling intrastate freight. The plaintiff was a

11. *Southern Ry. Co. v. Murphy*, 9 Ga. App. 190, 3 N. C. C. A. 791n; *Louisville & N. R. Co. v. Strange's Adm'x*, 156 Ky. 439, 6 N. C. C. A. 75n, 82n, 83n, 185n; *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 6 N. C. C. A. 189n, Ann. Cas. 1914 C 163n; *Wright v. Chicago, R. I. & P. R. Co.*, 94 Neb. 317, 6 N. C. C. A. 183n. A freight conductor was injured while operating a train between two points in the same state, which consisted solely of an engine and the way car. The train crew of which this conductor was a member, was not returning from a trip after hauling empty or loaded cars between the states, but was returning without transporting any commerce from one state to another. Under these facts the court said: "They were carrying instrumentalities which had been and probably would be used in the future for interstate and intrastate transportation combined, or only for intrastate purposes, or perchance for interstate commerce only. I cannot find that it has been decided that such act constitutes interstate commerce, but it has been in principle decided that it does not." *McAuliffe v. New York, C. & H. R. Co.*, 150 N. Y. Sup. 512.

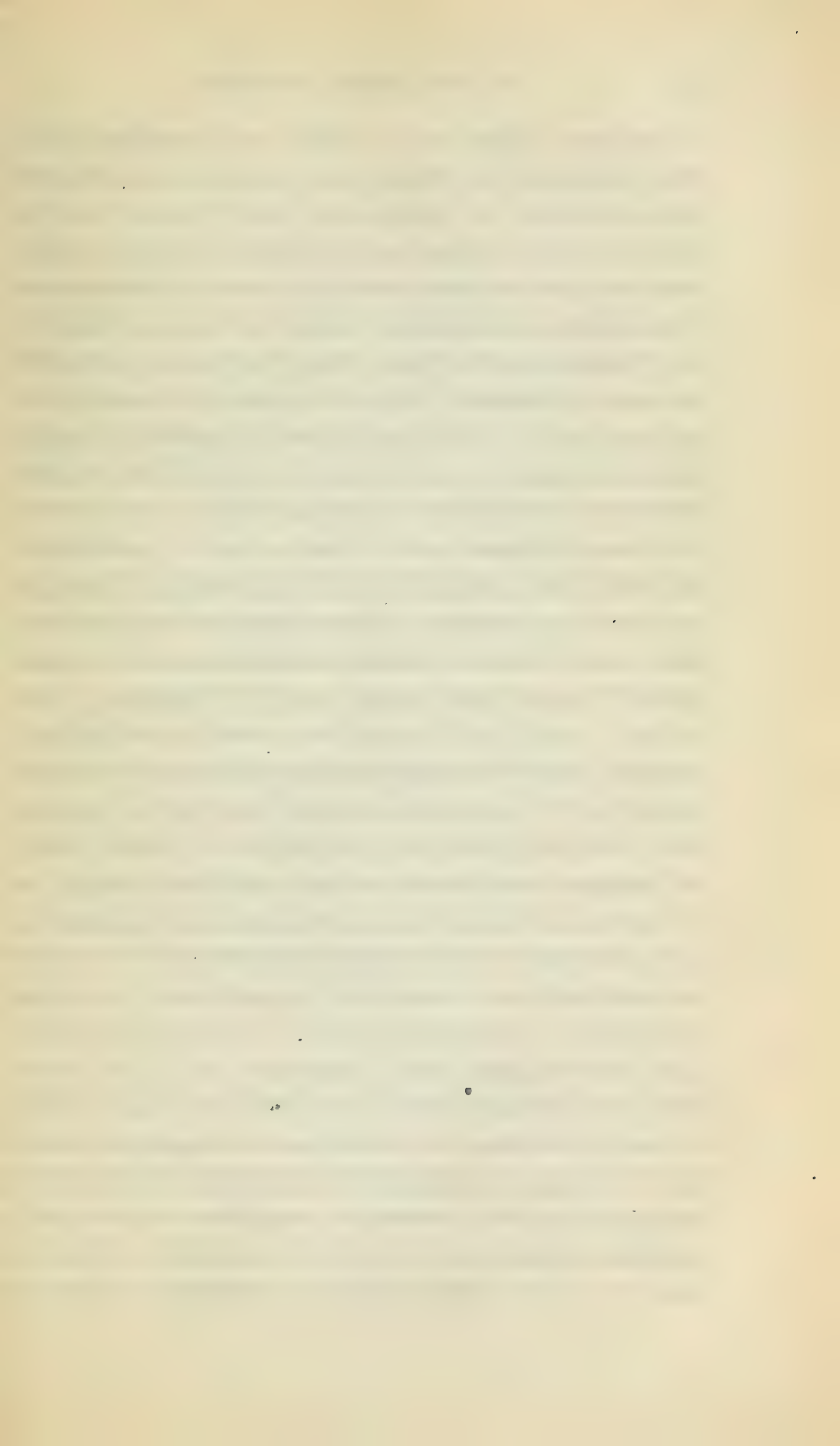
member of this switching crew working on a short line terminating at a smelting works. This crew made three or four trips a day out to the main line hauling cars containing both intrastate and interstate shipments. At other times while on duty they were engaged in switching the coal and coke cars from what were known as the "coke tracks" to other points nearby, all in the same state. The plaintiff was injured while employed in assisting in the transportation of the intrastate shipments, and the court held that he was engaged solely in intrastate commerce at the time and that his remedy was governed exclusively by the laws of the state where the casualty occurred.<sup>12</sup> A switchman, assisting in the movement of empty passenger cars after reaching a terminal, which had been used exclusively in transporting intrastate passengers, was held to have been, while so engaged, not employed in interstate commerce.<sup>13</sup>

**§ 30. Bridge Workers and Carpenters Employed in Interstate Commerce, When.**—If a railroad track of a common carrier is used indiscriminately for the purpose of carrying both interstate and intrastate commerce, then bridge workers and carpenters employed on such lines are engaged in interstate commerce within the meaning of the federal act.<sup>14</sup>

12. *Southern Ry. Co. v. Murphy*, 9 Ga. App. 190, 3 N. C. C. A. 791n.

13. *Patry v. Chicago & W. I. R. Co.*, — Ill. —, 106 N. E. 843, reversing same case reported in 185 Ill. App. 361.

14. *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 194 C 153n, reversing same case reported in 184 Fed. 737 and 117 C. C. A. 33, 197 Fed. 537. (Lamar, Holmes and Lurton, J.J., dissenting.)





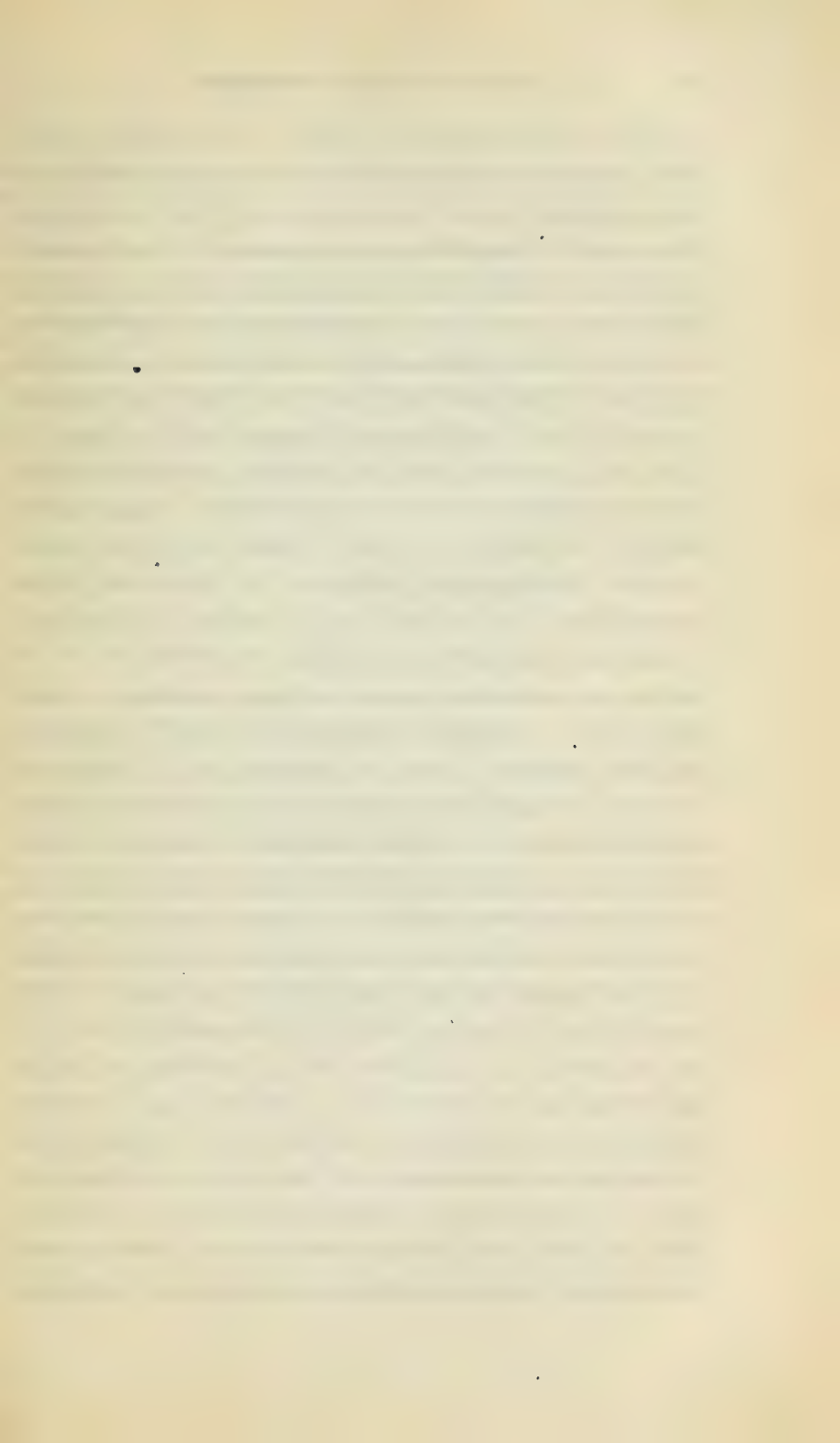


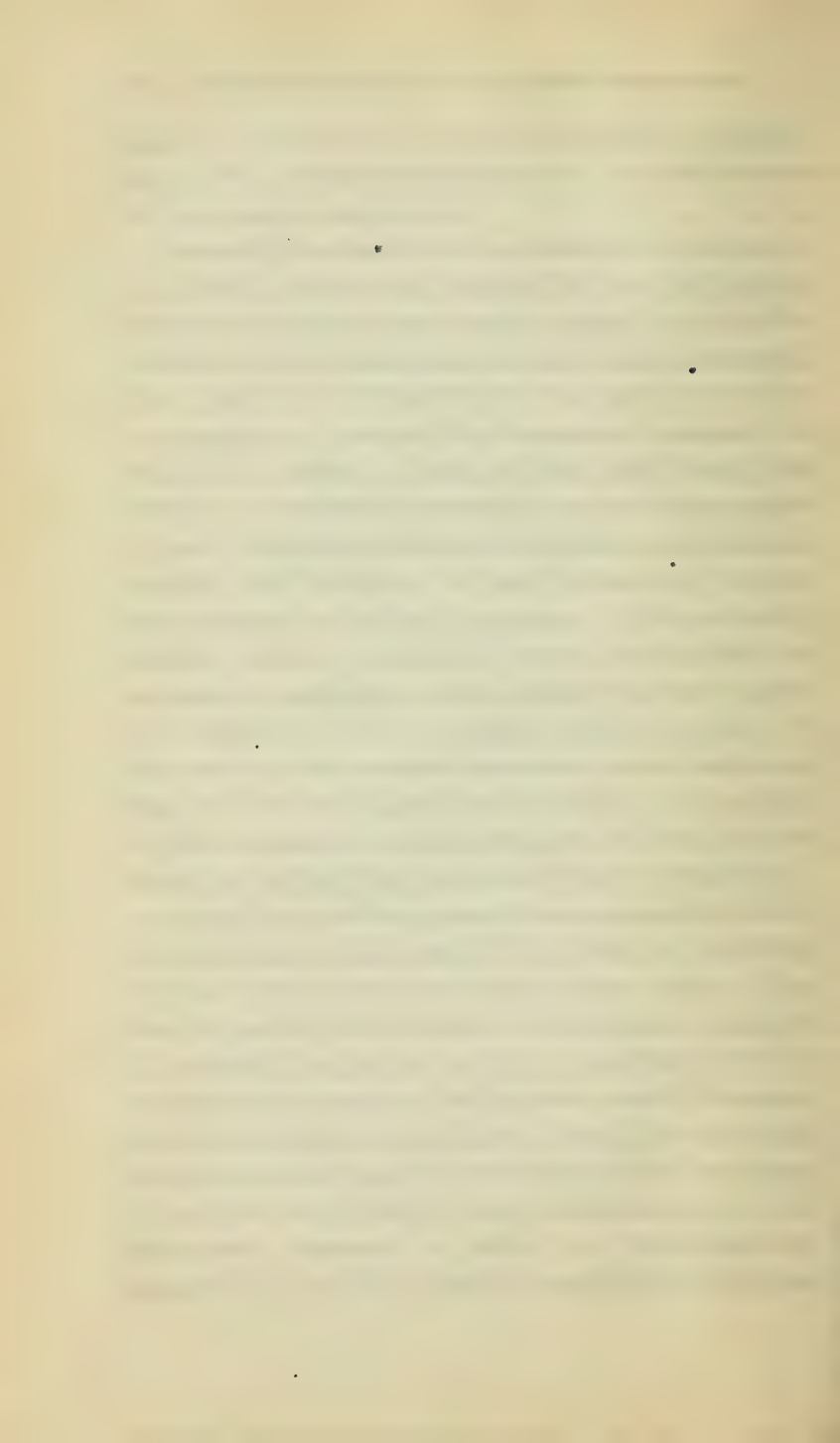
The Pederson case, cited in the notes, was one of the first and leading cases before the Supreme Court of the United States presenting the question as to when a railroad employe was engaged in interstate commerce by virtue of his employment and the court held that an iron worker employed in repairing a bridge on a railroad track, used indiscriminately for both interstate and intrastate commerce, was engaged in interstate commerce while he was carrying bolts or rivets from a tool car to a bridge although struck by a train carrying exclusively intrastate commerce. When struck, the plaintiff was not engaged in removing the old girder and inserting the new one but was merely carrying to the place some of the materials to be used there. These facts were presented to three courts and three different conclusions of law were drawn from them. In the final decision of the national Supreme Court, Justices Lamar, Holmes and Lurton dissented. The federal circuit court in which the case was tried held that an injury resulting from a co-employe engaged in intrastate commerce, was not within the terms of the act. The federal circuit court of appeals disapproved the ruling of the lower court but decided that the plaintiff was not engaged in interstate commerce. The Supreme Court disapproved both rulings and held that it was not essential where the causal negligence was that of a co-employe that he must also be employed in interstate commerce "for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence of 'any of the \* \* \* em-

ployes of such carrier' and this includes an employe engaged in intrastate commerce." On this feature all the judges concurred.

The court also held that the plaintiff was employed in interstate commerce, because the work of keeping bridges in repair is so closely related to interstate commerce as to be in practice and legal contemplation a part of it. Tried by the true test, is the work in question a part of the interstate commerce in which the carrier is engaged, the court found that bridges on interstate railroads, are as indispensable to such commerce as cars and engines, and that the security and efficiency of such commerce requires such bridges to be kept in repair. In the minority opinion, Justice Lamar held that carrying bolts to be used in repairing such a bridge was not a part of commerce but an incident which precedes it; that such an act was not commerce in any sense and that the Federal Employers' Liability Act applied to those engaged in transportation and not to those employed in building, manufacturing or repairing.

In holding that the plaintiff was engaged in interstate commerce, Mr. Justice Van Devanter, speaking for the court in the majority opinion, said: "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as





to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency \* \* \* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair which thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See *McCall v. California*, 136 U. S. 104, 109, 111, 34 L. Ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Second

Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 6, 59, 56 L. Ed. 329, 350 (1 N. C. C. A. 875), 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169; *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893, 897, 898 (3 N. C. C. A. 783n, 784); *Central R. Co. v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901 (4 N. C. C. A. 645n); *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665; *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce. The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is







to haul in interstate commerce. See *Lamphere v. Oregon R. & Nav. Co.*, 116 C. C. A. 156, 196 Fed. 336 (6 N. C. C. A. 187n, 47 L. R. A. [N. S.] 1n); *Horton v. Oregon-Washington R. & Nav. Co.*, 72 Wash. 503 (3 N. C. C. A. 784), 130 Pac. 897 (47 L. R. A. [N. S.] 8n); *Johnson v. Southern P. Co.*, 196 U. S. 1, 21, 49 L. Ed. 363, 371 (3 N. C. C. A. 784, 802n, 829n), 25 Sup. Ct. Rep. 158."

**§ 31. When Car Repairers and Roundhouse Employees Are Engaged in Interstate Commerce.**—Employees of common carriers by railroad repairing engines or cars used indiscriminately in both interstate and intrastate commerce as occasion requires, are employed in interstate commerce so that their rights in the event of injuries or the rights of their beneficiaries in cases of death are controlled exclusively by the Federal Act.<sup>15</sup>

In the *Maerkl* case, cited in the notes, the decedent was a car repairer and at the time of his death was repairing a box car. This car had been used for a long time in both interstate and intrastate commerce as occasion might arise, and was, at the time of the injury sustained by decedent, which subsequently caused his death, being repaired in a railroad terminal yard. It was held that the decedent was engaged in interstate commerce. In so holding, the court said: "It appeared from the evidence that the place where the repairing was done was on the main line of the defendant company, between

15. *Northern P. Ry. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1. This case was cited with approval by the Supreme Court in *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 152, 57 L. Ed. 1225, 6 N. C. C. A. 198n, 924n, *Ann. Cas.* 1914 C 153n.

Tacoma, Washington and Portland, Oregon, and was connected with it by switches over which the cars needing repairs were run, and over which, after repairing, they were again put into the service of the company for use in interstate and intrastate commerce, as occasion required, and the parties are agreed that this particular car upon which the deceased was at work when injured had been for a long time indiscriminately used in interstate and intrastate commerce and was to be again so used when repaired. That a car was used as one of the instruments of interstate commerce does not admit of doubt."

In another case the employe was also a car repairer. He was ordered to repair the tender of an engine which had brought in a freight train from another point in the same state but during the course of the transportation crossed into another state and then back into the state where the transportation originated. The plaintiff, at the time of his injury, was repairing the engine while it was on a "fire track" on which temporary repairs were usually made. After the completion of the repairs the engine was to be used in hauling another train over the same track over which it came. The engine had been habitually used in interstate commerce. Under these facts the court held that the plaintiff was employed for the defendant in interstate commerce.<sup>16</sup> A boiler maker's helper working in a machine shop of a railroad company was injured while repairing

16. *Baltimore & O. Ry. Co. v. Darr*, 124 C. C. A. 565, 204 Fed. 751, 6 N. C. C. A. 203n, affirming same case reported in 197 Fed. 665.





the "petticoat" of a freight engine regularly used by the defendant in interstate commerce. The engine was in the shop for what is called "roundhouse overhauling." It had been dismantled at least 21 days before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It was destined for return thereto upon the completion of the repairs and actually was so returned the day following the accident. The court held that the engine did not lose its interstate character from the mere fact that it was not at the time actually engaged in interstate commerce and that therefore the plaintiff was employed in interstate commerce within the purview of the federal act.<sup>17</sup>

In another case the plaintiff was a car repairer and was at work in the yards on a switching track. He went between two cars to fix the couplers when the two cars came together by being "kicked" through other cars sent on that track. The car having the defective coupler belonged to another railroad company. It had been brought to the place of the accident from another state delivered to the defendant loaded with coal and by the defendant delivered to the consignee. The car had then been unloaded and placed upon the track on which it was when the plaintiff was injured for the purpose of being redelivered to another railroad at the time the car was empty. Under these facts the court held that the plaintiff was engaged in interstate com-

17. *Law v. Illinois C. R. Co.*, 126 C. C. A. 27, 208 Fed. 869, 6 N. C. C. A. 103n, 201n.



merce.<sup>18</sup> A car repairer replacing a drawbar on a car used in transporting interstate commerce, was held to be engaged in interstate commerce and that his remedy under the federal act was exclusive.<sup>19</sup> A roundhouse employe while repairing an engine used in hauling both interstate and intrastate freight, was held to be engaged in interstate commerce.<sup>20</sup>

**§ 32. When Car and Engine Repairers Are Not Engaged in Interstate Commerce.**—If cars or engines upon which repairs are being made by railroad employes are used exclusively in intrastate commerce, the remedy of such employes injured while engaging in such work is determined exclusively by the laws of the state where the accident happened. A car repairer in the employ of a railroad company was killed while repairing a car that was transported from New Jersey to Pennsylvania carrying interstate commerce. The car had reached its destination and it was empty. Upon the end of the journey it was put on a side track for repairs. So far as the evidence appeared the car was in Pennsylvania awaiting orders and not long afterwards it was moved to another point in Pennsylvania beyond

18. *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643, 1 N. C. C. A. 853n, 861n.

19. *Walsh v. New York, N. H. & H. R. Co.*, one of the Second Employers' Liability Cases, reported in 223 U. S. 5, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *accord*, *Gaines v. Detroit, G. H. & M. Ry. Co.*, — Mich. —, 6 N. C. C. A. 202n, 148 N. W. 397; *St. Louis & S. F. Ry. Co. v. Conarty*, 106 Ark. 421, 6 N. C. C. A. 202n, 447n; *Missouri, K. & T. Ry. Co. v. Denahy*, — Tex. —, 6 N. C. C. A., 202, 165 S. W. 529.

20. *Winters v. Minneapolis & St. Louis R. Co.*, — Minn. —, 6 N. C. C. A. 78n, 201n, 148 N. W. 106.





which it was not traced. Decedent was killed while repairing this car. It was held that the administrator could not recover under the federal act.<sup>21</sup> In another case a carpenter was repairing a freight car. No facts appeared as to whether the car was used indiscriminately in transporting interstate and intrastate commerce. Nothing was shown as to either the prior or subsequent use of the car. It was held that the plaintiff could not recover under the federal act.<sup>22</sup> The decision in the last case was probably correct as, in the absence of evidence to the contrary, the car repairer was presumed to have been engaged in intrastate commerce.<sup>23</sup>

A roundhouse employe working on an engine in the roundhouse which had just returned from an intrastate journey was held not engaged in interstate commerce.<sup>24</sup> Under the facts in this case the decision was incorrect as the engine was used indiscriminately in hauling both kinds of commerce and the language of the court in determining when car repairers are engaged in interstate commerce does

21. *Heimbach v. Lehigh V. R. Co.*, 197 Fed. 579. This decision was rendered before the decision of the United States Supreme Court in the *Pederson* case, 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n, and the court announced in deciding the case that it was following the decision of the Federal Circuit Court of Appeals in the *Pederson* case, 117 C. C. A. 33, 197 Fed. 537, which was later reversed.

22. *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 4 N. C. C. A. 227n, 5 N. C. C. A. 771n.

23. *Erie R. Co. v. Welsh*, — Ohio —, 6 N. C. C. A. 77n, 188n, 105 N. E. 190; *Bradbury v. Chicago, R. I. & P. Ry. Co.* 149 Iowa 51; *Chicago, R. I. & P. Ry. Co. v. McBee*, — Okla. —, 145 Pac. 331.

24. *LaCasse v. New Orleans, T. & M. R. Co.*, — La. —, 6 N. C. C. A. 196n, 437n, 64 So. 1012.

not state the proper rule. It is generally held that car repairers on engines or cars used indiscriminately in both kinds of commerce are engaged in interstate commerce; but the court in this case used the following language: "We do not understand this evidence to mean any more than this locomotive, like any other locomotive of the defendant company, or any of its cars, might be and was sometimes used in interstate commerce. Not that it was being so used at the time the decedent was attending to it. On the contrary the evidence shows that its last run, which was on the preceding day, had been from another intrastate point to Eunice. If the fact that a locomotive or a car might be used the next day, or whenever next needed, in interstate commerce, was equivalent to being actually at the time in use in that commerce, the effect would be that whenever a railroad did not confine itself to intrastate commerce, but engaged also in interstate commerce, every one of its employes would at all times be engaged in interstate commerce when at their work."

In another action against a railroad company the plaintiff was a boiler maker working in the shops of a railroad company when injured. He was engaged in repairing a boiler of an engine used in operating a derrick on a flat car while it lay on the ground near the roundhouse. This derrick was a part of a wrecking train which was subject to orders and was used mostly in the state of Illinois and in other states when needed, depending upon the place of the disaster. The wrecking train consisted of a







locomotive, one or more flat cars, this derrick car and a bunk car. The employes on the wrecking train slept in the bunk car and remained there frequently for three or four days at a time. The court held that the plaintiff was not engaged in interstate commerce.<sup>25</sup>

**§ 33. Test in Determining When Switching Crews Are Engaged in Interstate Commerce.**—The sole test in determining whether switching crews employed in railroad yards are engaged in interstate commerce is whether at the very moment of the accident they are assisting in moving interstate trains, that is, cars either loaded or empty, originating in one state and destined to a point in another state, territory or foreign country.<sup>26</sup> In the Behrens case cited in the

25. *Ruck v. Chicago, M. & St. P. Ry. Co.*, 153 Wis. 158, 6 N. C. C. A. 204n. See § 47, *infra*.

26. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 6 N. C. C. A. 189n, Ann. Cas. 1914 C 163n, reversing same case reported in 192 Fed. 581. A switchman, on his way to work, was killed while crossing a railroad track in a terminal yard. He was regularly employed as a member of a switching crew. The evidence disclosed that the switch engine used by this switching crew was used indiscriminately in moving both interstate and intrastate commerce. But as there was no evidence, at the time he was killed, the decedent was engaged in interstate commerce or would assist in the switching of interstate cars when he commenced his work, it was held by the court that there could be no recovery under the Federal Employers' Liability Act. *Knowles v. New York, N. H. & H. R. Co.*, 150 N. Y. Supp. 99. On the other hand, a switchman who had been engaged in assisting the movement of interstate cars in a terminal, was at the time he was struck by a freight train, engaged in setting switches so that the switch engine could pass from a side track to the main line. In deciding that this switchman was engaged in interstate commerce the Federal Circuit Court of Appeals for the Sixth District, said: "Did the proof sufficiently tend to show that Morford was engaged in interstate commerce? At the moment, the switch engine was not hauling any cars, and so the true character of the employment can be deter-

notes a fireman on a switch engine was killed. The switching crew, of which he was a member, had been engaged in moving interstate commerce a short while before he was killed and the crew intended within a short time to again resume the work of moving cars loaded with interstate freight. But at the time of the accident the switching crew, including the fireman, was employed in moving a train of empties from one point in New Orleans to another, all the cars in the "drag" having originated and being destined to points within the same state. Under these facts the United States Supreme Court held

mined only by a broader view. The evidence showed that the railway company, in and about these yards, was continuously and indiscriminately hauling intrastate and interstate freight, and that, in this part of the work, no distinction whatever was made between the two classes. Describing the work of this train crew, the yardmaster's clerk said that it handled both intrastate and interstate shipments, that it handled all classes and character of freight and all kinds of cars during its working hours, and that it did the work of transferring and putting into other trains everything that came in for transfer, making no difference or distinction. When it was sought to get the cards constituting the record which would show exactly what cars had been handled that night, counsel for the railroad said: 'We admit that when these cars come in, they will show freight of every character and description, intrastate and interstate—both kinds.' In answer to the statement by plaintiff's counsel that he wished 'to show further that this character of interstate freight came in there and was handled by this train (crew) that night,' counsel for the railroad company admitted that at some time during that night this particular decedent had handled both intrastate and interstate freight, and that other freight of both kinds was coming in and going out of those yards, and that all the tracks down there were used for the handling of both. Upon this stipulation of fact, the trial proceeded. The circumstances here are not, in all respects, the same as those found controlling in the Pedersen Case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914 C 153, or the Seale Case, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914 C 156. They may also be distinguished, though we think not effectively, from the facts in the





that the fireman while so engaged and killed by the negligence of a co-employee was not engaged in interstate commerce within the meaning of the act. This was the first case reaching that court under the Employers' Liability Act in 1908 in which it was held that the employee was not engaged in interstate commerce at the time of the accident. The reason, as given by the court, for so holding was that since the act provides that the servant, in order to recover, must be injured "while he is employed by such carrier in such commerce" and since the switching crew at the time was only moving intrastate cars, the fireman while so working was not within the

Zachery Case, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914 C 159; because, in the latter case, it definitely appeared that the engine was about to be used, or was being prepared for use, in distinctively interstate commerce. The same difference and possible distinction exists with reference to *Law v. Illinois Central* (C. C. A. 6), 208 Fed. 869, 126 C. C. A. 27. However, we can draw no inference from these and other familiar decisions of the Supreme Court (including the *Behrens Case*, 233 U. S. 473, 477, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914 C 163), and the way in which they have interpreted the statute, save that liability is created where the service being rendered is of a general, indiscriminate character, not segregated and tied to shipments within the state (as in the *Behrens Case*, *supra*, 233 U. S. 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914 C 163), but applicable at least as well to the interstate commerce which the carrier is conducting. While it may not be easy in some cases to draw the line between the results of this view and a breadth of construction which would make the statute invalid under the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, yet cases like the present are fairly within the line of validity. They hardly go beyond fixing the burden of proof and declaring that, where the facts show the case may well have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary. It follows that the jury in this case had a right to find, as it did, that at the time of his death Morford was employed in interstate commerce." *Pittsburgh, C. & St. L. Ry. Co. v. Glinn*, — C. C. A. —, 219 Fed. 148, decided January 5, 1915.

terms of the act. The case removed a doubt and uncertainty that had theretofore existed among other courts as to whether trainmen and switching cars engaged sometimes in intrastate and sometimes in interstate commerce came within the provisions of the act. The court said: "Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight from one point of the city to another. That was not service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury. The question is correctly answered in the negative."

**§ 34. Switching Crews Engaged in Interstate Commerce.**—A member of a switching crew was engaged at the time he was injured in moving oil for the purpose of providing fuel for engines used in transporting freight and passengers from California to Oregon. The accident occurred in Oregon and the car containing the oil had been brought from California. The court held that he was engaged in interstate commerce.<sup>27</sup> A switchman at the time of his death employed in switching cars loaded with merchandise originating in one state and destined to a point in another state, was held to be engaged in interstate commerce within the meaning of the fed-

27. *Montgomery v. Southern P. Ry. Co.*, 64 Ore. 597, 47 L. R. A. (N. S.) 13n.









eral act.<sup>28</sup> A brakeman on an extra freight train while "breaking up" his train at a terminal was assisting in switching a car loaded with lumber and consigned to a point in another state. He was engaged in interstate commerce.<sup>29</sup> An engineer on a switch engine engaged in delivering cars containing coal which was to be used partly by locomotive engines of the railroad company employed in hauling trains containing interstate commerce was held to have a remedy under the federal act.<sup>30</sup> A petition in an action under the federal act declared that the defendant was a common carrier by railroad engaged in interstate commerce and had a freight yard in a town in Florida; that the decedent was an employe of the defendant in said yard as a switchman; that he was required, in the discharge of his duties in the movement of certain cars, to uncouple a car attached to an engine; that the engine was kept at said point to switch and move intrastate and interstate cars as circumstances required. It was held by a majority of the court that this declaration sufficiently alleged that at the time of the injury the decedent and the company were engaged in interstate commerce. Under the later ruling of the United States Supreme Court in *Illinois C. R. Co. v. Behrens*, no doubt the decision of the court in this case was too broad for, if, at the time of the injury, the decedent was assisting in the movement of intrastate cars only, his

28. *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379.

29. *Nashville, C. & S. L. R. Co. v. Banks*, 156 Ky. 609, 6 N. C. C. A. 99n, 105n, 186n.

30. *Barlow v. Lehigh V. R. Co.*, 158 App. Div. (N. Y.) 768, 6 N. C. C. A. 191n.

administrator would not have a remedy under the Federal Act.<sup>31</sup> A switchman injured while riding on a car in transit from Indianapolis, Ind., to East St. Louis, Ill., and which was being switched at the time, to the warehouse at the point of delivery, to be unloaded, was engaged in interstate commerce.<sup>32</sup>

**§ 35. Switching Cars Containing Intrastate Shipments Into or Out of Interstate Trains—Conflicting Rulings.**—Whether an employe engaged in “setting out” a car containing intrastate shipments or “picking up” a car containing such shipments from or into, as the case may be, a train containing interstate traffic while such cars are detached from the train, are employed in interstate commerce, is a question which has given the courts considerable difficulty in solving and has resulted in conflicting rulings. The national Supreme Court has not apparently passed upon this phase of interstate employment. In the Behrens case in which the employe was declared to be employed in intrastate commerce, the switching crew was engaged in moving cars, all of which originated in and were destined to points in the same state so that the decision does not reach the question here presented.<sup>33</sup>

With the decision in the Behrens case before it, the Supreme Court of Kansas, in a case which was presented by able lawyers, decided that a brakeman was employed in interstate commerce while doing

31. *Atlantic C. L. Co. v. Reaves*, 125 C. C. A. 599, 208 Fed. 141.

32. *Hall v. Vandalia R. Co.*, 169 Ill. App. 12.

33. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 6 N. C. C. A. 189n, Ann. Cas. 1914 C 163n.





such work.<sup>34</sup> In that case a brakeman on an interstate train was required to assist in "picking up" a car standing on the siding and consigned to another point in the same state. This car, while so standing on the siding, was coupled to another car. The engine of the train was uncoupled from the train and moved to the siding and there attached to the two cars which were then pulled out from the siding upon the main line in order to place the car which was to be transported, in the train. After reaching the main line, and while the two cars were coupled up to the engine and detached from the train, the brakeman stepped between the two cars to uncouple the one that was to be taken from the other which was not to be taken. Owing to a defective coupler he was killed. The defective coupler was on the car which was to be taken into the train. Nothing appeared in the record as to the destination of the other car on the siding, except that the crew was to replace it on the siding where they found it. It was moved to the main line simply because it stood between the engine and car which was to be taken into the train. Under these facts the court held that the brakeman was engaged in interstate commerce notwithstanding the fact that the car, the movement of which he was assisting at the time of his death, contained only intrastate traffic and had not become a part of or attached to the train.

In another case a brakeman was employed on a

34. *Thornbro v. Kansas City, M. & O. Ry. Co.*, 91 Kan. 684; 139 Pac. 1199, affirmed on rehearing, 92 Kan. 681.

train consisting partly of cars destined to points outside of the state.<sup>35</sup> The train was running between two points in Texas. At Etholene, Texas, a station on the line between the two terminals, a car loaded with merchandise originating at Dallas, Texas, was "set out" from the train for delivery on a siding at that station by making a "flying switch." The brakeman, while this car containing intrastate traffic was being switched, was standing on top of it. In performing the "flying switch," the engine and several other cars in the train, including the car mentioned on which the plaintiff was standing, were detached from the train on the main line. During the performance of the work of switching this car on the siding, the engineer stopped the train before the car which was to be "set out" was cut loose from the other cars and the brakeman was jerked off, fell and was injured. Under those conditions the Federal Circuit Court of Appeals held that the brakeman was not engaged in interstate commerce. The only difference between the Thornbro and the Van Brimmer cases in so far as the feature under discussion is concerned was that in the former the employe was assisting in switching an intrastate car into an interstate train and in the latter the employe was switching an intrastate car out of an interstate train. Of course this difference could have no force in the application of the principle and the cases are squarely in conflict. In the Van Brimmer case it appeared that some of the cars contained interstate

35. *Van Brimmer v. Texas & P. Ry. Co.* (C. C. A.), 190 Fed. 394, 6 N. C. C. A. 79n.







shipments as it did in the Thornbro case, but whether the cars which were attached to the intrastate car "set out" at the time of the accident contained interstate shipments does not appear from the reported opinion any more than the interstate or intrastate character of the other car attached to the intrastate car in the Thornbro case. Of course, if it appeared that the other car attached to the intrastate car in the Thornbro case, at the moment of the accident or the other car attached to the intrastate car in the Van Brimmer case, contained interstate commerce, then unquestionably the employe was engaged in interstate commerce under other rulings of the national Supreme Court. In another case a brakeman was injured through the negligence of a fellow servant while on a sidetrack setting out cars containing only intrastate traffic, although the train on which he was working contained interstate shipments. It was held that his work on the sidetrack was an incident to the operation of the entire train in interstate commerce.<sup>36</sup> It was held in another case that a fireman engaged in switching intrastate cars to be put in a train composed partly of cars containing interstate shipments, was employed in interstate commerce so that his remedy under the federal act was exclusive.<sup>37</sup>

It would seem on principle that employes engaged

36. *Carr v. New York, etc., R. Co.*, 77 Misc. (N. Y.) 346. The case in the preceding note was called to the attention of the court in the Carr case, but the court held it to be in conflict with other federal decisions and refused to follow it.

37. *Southern Ry. Co. v. Jacobs*, — Va. —, 6 N. C. C. A. 94n, 186n, 81 S. E. 99.

in picking up or setting out intrastate cars at stations between terminals out of or into interstate trains, are engaged in interstate commerce, notwithstanding the fact that the car is detached from the train and on a siding at the time of the injury. A train employe is either employed in interstate commerce or intrastate commerce. He cannot, in the sense of determining liability under the federal act, be employed in both kinds of commerce at the same time so as to have a choice of remedy. Now under the conditions described, if the employe is engaged in intrastate commerce, when does the interstate character of his employment end? Is it when the car while still standing where it was when it was a part of the interstate train, is uncoupled? Or is it when it has left the main line? The entire act of switching intrastate cars from the time of the uncoupling to the delivery on the siding, it seems, is so much a part of the work in the movement of that interstate train and so directly connected with that movement that the employe so engaged, should be held to be employed in interstate commerce. Indeed such employes' connection with interstate commerce while even on the siding, is as direct and immediate as the work of employes at terminals in preparing interstate trains for movement or in moving materials or instrumentalities to be used on interstate trains, or yard clerks checking incoming trains in the switching yards after arrival at terminals and after the train employes have left the yards.<sup>38</sup>

38. *St. Louis & S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed.





§ 36. **Section Men and Track Laborers.**—All section men and track laborers while working on or repairing any part of the track or switches used by a common carrier by railroad, indiscriminately, for both interstate and intrastate commerce, are employed in interstate commerce within the meaning of the national statute.<sup>39</sup> For instance, a section man on an interstate railroad killed while sweeping snow from the switches at a station between terminals was held to be engaged in interstate commerce.<sup>40</sup> A member of a track gang engaged in ballasting a railroad track used in transporting freight and passengers between different states was held to be employed in interstate commerce while so engaged.<sup>41</sup> A section hand injured while placing a rail in a side-track near a main line over which trains carrying interstate commerce habitually passed was held to be employed in interstate commerce.<sup>42</sup> A track walker at the time he was struck and injured by an intrastate train was repairing a switch on a track used for both intrastate and interstate commerce and he was held to have a remedy under the federal act.<sup>43</sup> A section man, while driving spikes on a railroad

1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n; *Neil v. Idaho R. Co.*, 22 Idaho 74; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n.

39. *Southern Ry. Co. v. Howerton*, — Ind. —, 6 N. C. C. A. 75n, 82n, 101 N. E. 121, 105 N. E. 1025.

40. *Hardwick v. Wabash R. Co.*, — Mo. App. —, 168 S. W. 328.

41. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870, 6 N. C. C. A. 197n.

42. *Jones v. Chesapeake & O. Ry. Co.*, 149 Ky. 566.

43. *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832; affirmed 113 C. C. A. 379, 192 Fed. 901.



track on which the railroad company transported interstate commerce was declared to be employed in interstate commerce.<sup>44</sup> A section foreman of a railroad company operating a line which traversed several states and injured through the negligence of trainmen operating a train hauling interstate commerce, was held to have a remedy under the federal act.<sup>45</sup> A railroad employe engaged in relaying rails on a switch track near a station on a main line and over which interstate commerce was carried, was held to have a remedy under the federal act.<sup>46</sup>

**§ 37. Employes Preparing or Moving Materials or Instrumentalities to be Used on Interstate Trains.**—Employes of a railroad company engaged in the work of furnishing coal, water or oil for engines engaged indiscriminately in pulling interstate and intrastate freight or in furnishing materials, such as ice, for passenger trains hauling any interstate passengers, are engaged in interstate commerce within the terms and conditions of the federal act.

A porter on a passenger train when injured was lifting cakes of ice for a water cooler in a coach of a passenger train. The passengers on the train, with the exception of two traveling from one state to another, were making intrastate trips. The court held that the porter was employed in interstate

44. *Zikos v. Oregon, W. R. & N. Co.*, 179 Fed. 893, 3 N. C. C. A. 783n, 784.

45. *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 6 N. C. C. A. 75n, 196n, overruling in effect *Charleston & W. C. R. Co. v. Anchors*, 10 Ga. 329.

46. *Truesdell v. Chesapeake & O. Ry. Co.*, 159 Ky. 718.





commerce.<sup>47</sup> An engineer at a station engaged in pumping water to be used by engines engaged in pulling either intrastate or interstate commerce, as the business exigencies of the defendant required, was declared to be engaged in interstate commerce.<sup>48</sup> The court in the last case, answering the contention that a stationary engineer pumping water was not engaged in interstate commerce, said: "Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master as well as the local trains, must have ceased altogether. This demonstrates the 'real or substantial' connection of his employment with such commerce. There can be no possible distinction in the relation to interstate commerce between the employment of the fireman who stokes the engine

47. *Freeman v. Powell*, — Tex. —, 144 S. W. 1033; *Powell v. Freeman*, 105 Tex. 317. A brakeman was injured by falling into a cinder pit while he was walking over a railroad yard looking for a tool boy to get a tin cup for the way car of an interstate train on which he was about to leave the terminal. It was held that he was engaged in interstate commerce. *Baltimore & O. R. Co. v. Whitacre*, — Md. —, 92 Atl. 1060. This was the first case under the Federal Employers' Liability Act before the Court of Appeals of Maryland.

48. *Horton v. Oregon, W. R. & N. Co.*, 72 Wash. 503, 3 N. C. C. A., 784, 47 L. R. A. (N. S.) 8n, overruling *Tsmura v. Great N. Ry. Co.*, 58 Wash. 316, 3 N. C. C. A. 786n.

hauling the train so engaged, and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too fine-spun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. The pumper's relation to actual transportation of interstate freight and passengers is much more direct and intimate than that of a car repairer or repairer of an engine tender, who bestows his labor on instrumentalities while they are, so to speak, temporarily out of commission. To allow a recovery to these, and not to the pumper supplying the water for motive power in actual transportation would smack of caprice."

A railroad employe assisting in the movement of water and coal which was to be used on the engines of an interstate railroad in hauling interstate commerce, was held to have a remedy under the federal act.<sup>49</sup> A switchman engaged in switching coal into coal chutes of a railroad company which was to be used on engines hauling interstate commerce was employed in interstate commerce.<sup>50</sup> An employe engaged in dumping coal from a coal chute into the tender of an engine which was being then prepared for the purpose of taking a passenger train from a

49. *Barker v. Kansas City, M. & O. Ry. Co.*, 88 Kan. 767, 43 L. R. A. (N. S.) 1121; *contra*, *Missouri, K. & T. Ry. Co. v. Fesmire*, — Tex. —, 150 S. W. 201. Under the facts presented on a second appeal, the court reached a different conclusion in the *Barker* case. *Barker v. Kansas City, M. & O. Ry. Co.*, — Kan. —, 146 Pac. 358, decided February 6, 1915. See § 171, *infra*.

50. *Barlow v. Lehigh V. R. Co.*, 158 App. Div. (N. Y.) 768, 6 N. C. C. A. 191n.







terminal in one state to a point in another state, was engaged in interstate commerce.<sup>51</sup> A railroad employe injured while loading tobacco on a car which was to be transported into another state, was held to have a remedy under the federal act.<sup>52</sup> A brakeman carrying ice in a railroad yard to cool a hot box on a car in an interstate train was held to be within the protection of the national statute.<sup>53</sup> A member of a switching crew transferring oil from a car to be used on railroad engines hauling interstate trains was employed in interstate commerce.<sup>54</sup> An engineer, when injured, was running an engine between two points in the same state for the purpose of ascertaining whether the engine was in proper condition to pull an interstate train. The court decided he was engaged in interstate commerce.<sup>55</sup>

**§ 38. Employes Preparing Interstate Trains for Movement.**—Employes of a railroad company while doing any act within the scope of their employment necessary or expedient to prepare interstate trains for movement, are employed in interstate commerce within the terms of the federal act. A fireman on a locomotive engine, inspecting, oiling, firing and preparing his engine for an interstate trip, was, while so engaged, within the protection of the national

51. *Armbruster v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 6 N. C. C. A. 195n, 147 N. W. 337.

52. *Illinois C. R. Co. v. Porter*, 207 Fed. 311, 6 N. C. C. A. 98n, 205n.

53. *Illinois C. R. Co. v. Nelson*, 122 C. C. A. 258, 203 Fed. 956.

54. *Montgomery v. Southern P. R. Co.*, 64 Ore. 597, 47 L. R. A. (N. S.) 13n.

55. *Lloyd v. Southern Ry. Co.*, — N. C. —, 6 N. C. C. A. 190n, 81 S. E. 1003.

statute although he had not at the time of his injury and death participated in assisting in the movement of any interstate freight and the engine had not been coupled to the cars of the train.<sup>56</sup> A switchman who stepped upon a defective footboard of a switch engine while engaged in making up an interstate train was held to be within the terms of the act.<sup>57</sup> Applying the same principle no doubt the courts will hold when such facts present themselves for adjudication that car inspectors looking over and inspecting cars in interstate trains, if injured while so employed, are engaged in interstate commerce.

A freight conductor of a train loaded with both interstate and intrastate freight which had just been made up at a terminal, walked to the head of the train to give the engineer his clearance card and while returning to the caboose, he walked along a scale track on which some switching was being done and inspected the train as he walked. He was hurt on the scale track. Answering the argument of counsel that his employment did not require him to walk on this scale track, the court replied: "While it may not have been his duty and was carelessness on his part, under the facts of this case, to walk upon said scale track, still we think he was engaged in interstate commerce to the extent of getting his train ready for that purpose. It seems to us that preparation was being made to have his train leave Spirit

56. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n.

57. *Bramlett v. Southern Ry. Co.*, — S. C. —, 6 N. C. C. A. 75n, 83n, 82 S. E. 501.





Lake and that he was engaged in getting his train ready for the transportation of freight both within the state and beyond its boundaries and that he was engaged in interstate commerce within the meaning of that term as used in said Act of Congress.”<sup>58</sup> An engineer upon his engine preparing it to be attached to an interstate train for the purpose of hauling it, is engaged in interstate commerce.<sup>59</sup>

**§ 39. Employees on Premises of Railroad Company Going to or from Work.**—The federal statute not only includes employees actually engaged in interstate commerce but it also covers such employees on the railroad premises while going to or from their work for in such cases they are only doing that which is essential to enable them to discharge their duties as employees engaged in interstate commerce. For instance, a railroad section man had been engaged in ballasting the main track of a railroad which carried freight and passengers between different stations. At the time he was injured he was returning to the camp at the conclusion of his day’s labor on a handcar. The court held that he was still engaged in interstate commerce within the terms of the national statute.<sup>60</sup> Another court held that a member of a track laying gang which worked during the usual hours in the daytime, was employed in inter-

58. *Neil v. Idaho R. Co.*, — Idaho —, 125 Pac. 331.

59. *Bower v. Chicago & N. W. R. Co.*, — Neb. —, 6 N. C. C. A. 213n, 148 N. W. 145.

60. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870, 6 N. C. C. A. 197n; *accord*, *Grow v. Oregon S. L. R. Co.*, — Utah —, 6 N. C. C. A. 83n, 199n, 138 Pac. 398.

state commerce while asleep at night in a bunk car on a side track.<sup>61</sup>

A locomotive fireman in the employ of a railroad company was ordered to proceed from his home to the railway station of the defendant in that town and there secure transportation and go on a certain interstate train to another town in the same state where he was to assist in relieving a train crew which had been employed continuously for more than 16 hours on an interstate train. After receiving this order the fireman hastened to the depot and had reached a crossing in the yards of the railroad company where the cars were cut, when, without warning, the cars were suddenly closed by reason of other cars being negligently "kicked" against the other and he thereby sustained injuries causing his death. In a subsequent action under the federal act the petition alleged that at the time of the happening of the injury and death "and immediately prior thereto, he was engaged in the performance of his duty in the employment of the said Oregon Railroad & Navigation Company in doing and performing exclusively the acts and things necessary and properly to be done in the performance of his said duties in obedience to the order of said company, and as a part of the necessities and requirements of the said company in aid of and as a part of the operation of its cars, engines and trains in carrying on defendant's business of interstate commerce by railroad." Under these facts it was held by the

61. *Sanders v. Charleston & W. C. Ry. Co.*, — S. C. —, 6 N. C. C. A. 200n, 81 S. E. 283. See § 14, *supra*.







Federal Circuit Court of Appeals that the decedent was employed in interstate commerce, the court saying: "The decedent when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to-wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company."<sup>62</sup>

Assuming that the employe was either returning from or going to work for the company in interstate commerce, the question as to whether he was engaged in interstate commerce while so going to or from his work, will depend upon the further question as to when the relation of master and servant commences or ends, as the case may be and the solution of this problem must be made in the light of common law decisions applicable. The relation of master and servant in so far as the obligation to protect the employe is concerned begins when the employe is necessary on the premises of the master pursuant to his contract of employment.<sup>63</sup> A fireman

62. *Lamphere v. Oregon R. & N. Co.*, 116 C. C. A. 156, 196 Fed. 336, 6 N. C. C. A. 187n, 47 L. R. A. (N. S.) 1n, reversing same case reported in 193 Fed. 248; *accord*, *Missouri, K. & T. Ry. Co. v. Rentz*, — Tex. Civ. App. —, 6 N. C. C. A. 195n, 162 S. W. 959.

63. *Lamphere v. Oregon, R. & N. Co.*, 116 C. C. A. 156, 196 Fed. 336, 6 N. C. C. A. 187n, 47 L. R. A. (N. S.) 1n; *Packet Co. v. McCue*, 17 Wall. (N. S.) 508, 21 L. Ed. 705; *Dishon v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C. A.), 126 Fed. 194; *Olsen v. Andrews*, 168 Mass.

left his engine in the railroad yards and went to his boarding house on a personal errand. While he was walking through the yards he was struck by some cars. On his return he expected to fire an engine pulling an interstate train. It was held that he was engaged in interstate commerce at the time of the casualty.<sup>64</sup> A hostler who worked in a roundhouse on engines used in hauling both interstate and intrastate commerce was held not to be engaged in interstate commerce while he was walking through the yards to a rest shanty on the property of the railroad company.<sup>65</sup> An extra brakeman, working for a railroad company, having been sent out on a passenger train carrying interstate passengers as a brakeman was, at the time of his injuries, returning on another train on a "pass" back to the division point. In railway parlance he was "dead-heading" back to his headquarters. The court held that he was engaged in interstate commerce although he was not employed on the train he was riding on.<sup>66</sup> A member of a track laying gang while resting on Sunday in a camp on the right of way was directed by one of the foremen to get on a passing train in order to get the

261; *Boldt v. New York C. R. Co.*, 18 N. Y. 432; *Ewald v. Chicago & N. W. R. Co.*, 70 Wis. 420, 5 Am. St. Rep. 178; *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. Cas. (D. C.) 123, 1 N. C. C. A. 841n.

64. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n.

65. *Gray v. Chicago & N. W. Ry. Co.*, 153 Wis. 636, 4 N. C. C. A. 225n. The court in this case also held that hostlers working on engines used indiscriminately in carrying both interstate and intrastate commerce were not engaged in interstate commerce. See § 31, *supra*.

66. *St. Louis & S. W. Ry. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.





mail for the camp at the next station. When he tried to get on the train he fell and was injured. The court held that he was not engaged in interstate commerce.<sup>67</sup> A railroad employe at the time he was injured had completed his work for the day and had left the work shop and the premises of the railroad company. He was walking along a street when he was struck by a piece of timber thrown from a train belonging to the railroad company for which he worked. The court held that the relation of master and servant did not exist so as to render the company liable for the act of another employe in negligently throwing the timber.<sup>68</sup> A railroad employe while riding home on one of the company's trains was held not employed in interstate commerce as there was no evidence introduced to show that he was then or had been employed in interstate commerce.<sup>69</sup> The opinion does not disclose the nature of his employment for the railroad company.

**§ 40. Employes Engaged in the Original Construction of Instrumentalities for Future Use in Interstate Commerce Not Within the Act.**—Employes assisting in the original construction of tracks, tunnels, bridges, engines or cars which have never been used

67. *Meyers v. Norfolk & W. Ry. Co.*, — N. C. —, 78 S. E. 280. The court in this case based its decision on three cases subsequently overruled in a higher court, *St. Louis, S. F. & F. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, Ann. Cas. 1914 C 156n; *Lamphere v. Oregon R. & N. Co.*, 193 Fed. 248, 116 C. C. A. 156, 196 Fed. 336, 6 N. C. C. A. 187n, 47 L. R. A. (N. S.) 1n; *Pederson v. Delaware, L. & W. R. Co.*, 117 C. C. A. 33, 197 Fed. 537.

68. *Fletcher v. Baltimore & O. R. Co.*, 168 U. S. 135, 42 L. Ed. 411, reversing same case reported in 6 App. Cas. (D. C.) 385.

69. *Bennett v. Lehigh V. R. Co.*, 197 Fed. 578.



as instrumentalities of interstate commerce, are not employed in interstate commerce within the meaning of the statute.<sup>70</sup> An interstate railroad company was constructing a "cut-off" so as to shorten a route used by it which, when completed, would have been used for hauling interstate commerce. A teamster was engaged in driving a horse which pulled cars filled with dirt and rock along the track out of a tunnel which was a part of the "cut-off" line. It was held that he was not engaged in interstate commerce and the mere fact that the line, when completed, would be used in transporting interstate commerce, would make no difference.<sup>71</sup> In that case, the court said: "Stripped of the conclusions in the complaint, we have the fact that the defendant is engaged in constructing a 'cut-off' on its line of road so as to shorten the route used by it now and eliminate some of the inconveniences, and possible expense, in the operation of the line at the present time. There is no statement that this line, upon which the work is being performed, is now used, but the complaint in paragraph 3 says, 'and through which, when completed, the interstate commerce \* \* \* will be routed.' The plaintiff was not himself engaged upon any interstate commerce, nor was he injured by any one connected with the opera-

70. *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n, reversing the same case in 117 C. C. A. 33, 197 Fed. 537, which affirmed 184 Fed. 737.

71. *Jackson v. Chicago, St. P. & M. R. Co.*, 210 Fed. 495, 6 N. C. C. A. 200n. See dissenting opinion in *Grow v. Oregon S. L. R. Co.*, — Utah —, 138 Pac. 398, 6 N. C. C. A. 83n, 199n.





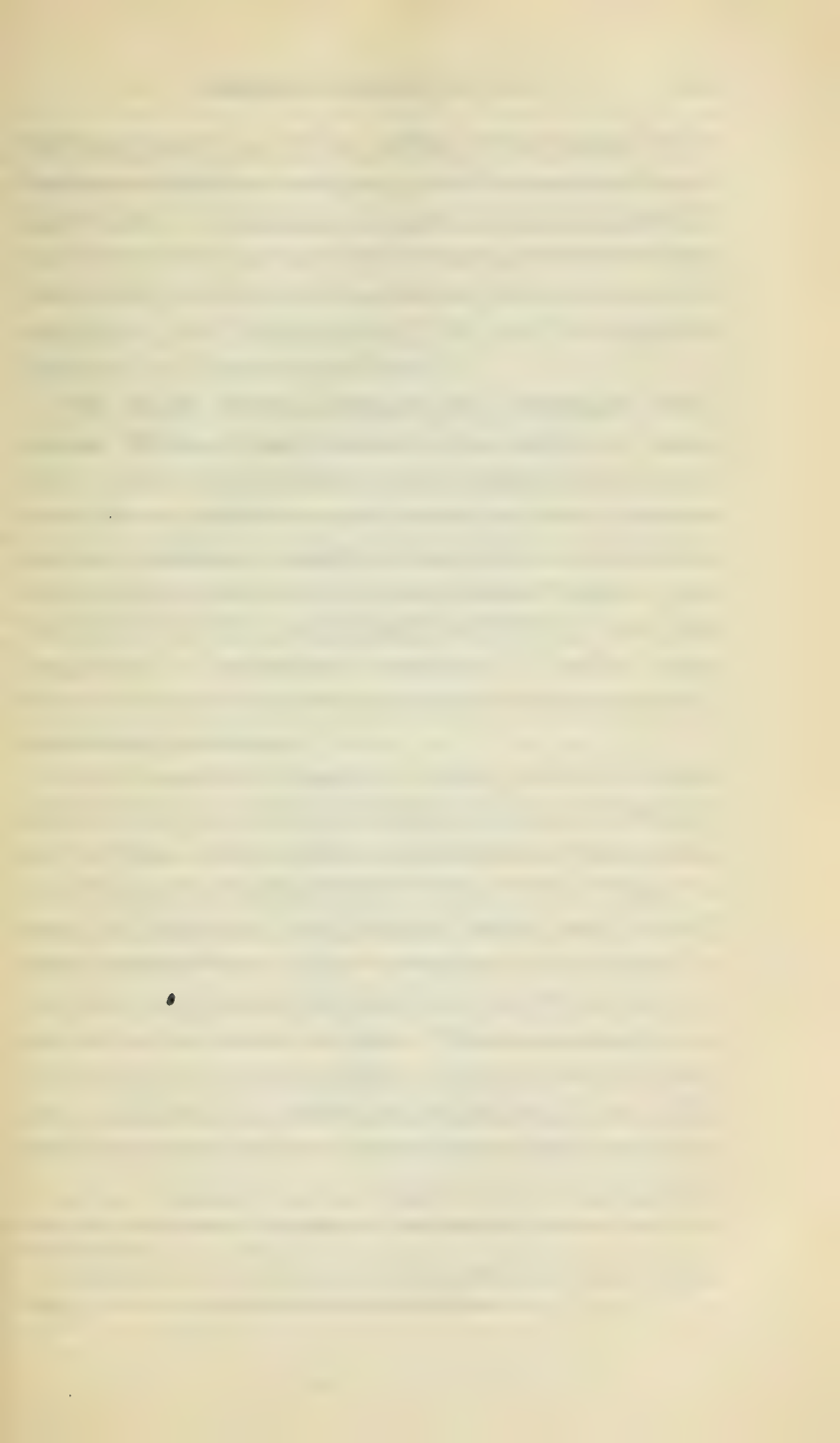


tion of any of the agencies which actually transported interstate commerce. The building of this cut-off is a facility which is to be used by the defendant, when completed, as an engine or cars, or any other appliance under construction might be considered for use when completed. Can it be said that a person engaged in the building of engines or cars, or any other facilities to be used by a common carrier engaged in interstate commerce, comes within the provisions of the Employers' Liability Act? The act deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327 (1 N. C. C. A. 875), 38 L. R. A. (N. S.) 44. The act is not 'concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities, and during their use as such.' Pederson v. Del., Lack. & West. R. R., 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125 (6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n). The language of the complaint, 'when completed, the interstate commerce \* \* \* will be routed' through the tunnel, conclusively shows that it is not now so employed; hence the act cannot apply, and Supreme Court decisions *supra* are decisive. Tested by the requirements of the act, I do not think that the tunnel was used as an appliance in transporting interstate commerce, nor was the plaintiff

employed in such commerce. All of the cases cited, I think, are in harmony with this conclusion.”

**§ 41. Repairing or Rebuilding Instrumentalities Used in Interstate Commerce.**—On the other hand a carpenter employed in sawing boards and nailing them in place on the wall of a new office in a freight shed of a railroad company which was engaged in both interstate and intrastate commerce, was held to be employed in interstate commerce.<sup>72</sup> The reason for so holding was that freight sheds, depots and warehouses, or other facilities provided and used by a carrier for receiving, handling and discharging interstate freight were as much instrumentalities used in interstate commerce as engines, cars and bridges, so used indiscriminately in both kinds of commerce. Distinguishing this case from the cases cited in the foregoing section, the court said: “Claim is made that, since plaintiff at the time of his injury was at work in framing a new office in the freight shed, he is in the position of one employed to construct buildings, tracks, engines, or cars, which have not yet become instrumentalities of commerce. But the freight shed in question was being so used by the defendant in its interstate business. The work in which the plaintiff was engaged, as appears from

72. *Eng. v. Southern Ry. Co.*, 210 Fed. 92, 6 N. C. C. A. 78n, 79n, 200n. A carpenter while employed in moving debris from a roundhouse which had been partially destroyed by fire in order that a new roundhouse might be erected for railroad purposes was injured while so working. The roundhouse was used by the defendant in housing engines engaged in hauling interstate commerce. The court held that the plaintiff was engaged in interstate commerce, as he was repairing an instrumentality of such commerce. *Thomas v. Boston & M. R. Co.*, 219 Fed. (C. C. A.) 180.





the complaint, was in the nature of the repair of an instrumentality so used, and not the construction of new work." Applying the same principle, another court held that an employe in the signal service was employed in interstate commerce when he was installing a new block system to be used in signaling trains on an interstate railroad.<sup>73</sup>

**§ 42. Yard Clerks Engaged in Interstate Commerce, When.**—Yard clerks in the employ of common carriers by railroad while examining and recording the numbers and initials of cars, inspecting and making a record of the seals on car doors, checking the cars with the conductors' lists or putting labels on the cars to guide switching crews are employed in interstate commerce if trains upon which they are so working have any cars containing interstate commerce.<sup>74</sup>

In the case of *St. Louis, S. F. & T. R. Co. v. Seale*, cited in the notes, the decedent was a yard clerk and at the time of his injury and death he was on his way through a railroad yard to one of the tracks to meet an incoming freight train which had arrived from another state. He was going to the train to take the numbers of the cars and otherwise perform his duties in respect to them. While so engaged he was struck by a switch engine, which, it was claimed, was negligently operated by other employes. The Supreme Court of the United States held that the

73. *Grow v. Oregon, S. L. Co., — Utah —*, 6 N. C. C. A. 83n, 199n, 138 Pac. 398; *accord*, *Saunders v. Southern Ry. Co., — N. C. —*, 83 S. E. 573.

74. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n.



decendent was engaged in interstate commerce at the time of his death, Mr. Justice Lamar, dissenting. Discussing the legal effects of the facts mentioned, the court said: "In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. The train from Oklahoma was not only an interstate train but was engaged in the movement of interstate freight; and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."

**§ 43. Pullman Employees.**—Persons employed jointly by a sleeping car company and a railroad company are within the protection of the federal act. A Pullman porter was employed on a sleeping car which was owned jointly by the Pullman Company and a railroad company and the car was operated by them as an association under a contract. It was held that the administrator of his estate could recover under the national statute.<sup>75</sup> On the other hand in another case the railroad company simply

75. *Oliver v. Northern P. R. Co.*, 196 Fed. 432.





hauled cars of the Pullman Company under a contract and it was decided that a porter on the sleeping car belonging to the Pullman Company was not an employe of the railroad company within the meaning of the federal statute.<sup>76</sup>

**§ 44. Agents of Express Companies.**—Agents of express companies riding on passenger trains are not employes of the railroad company within the meaning of the federal act where they are paid and employed by the express companies although they handle baggage of passengers on the train.<sup>77</sup> In another case it was decided that an express messenger employed and paid by an express company, while riding on a passenger train of a railroad company and looking after the express business of his employer was presumed to be a passenger and not a servant of the railroad company although he was killed while so employed through the negligence of the railroad company's employes.<sup>78</sup> It was held by the court that, in the absence of any evidence that he was employed by the railroad company, the evidence was sufficient to show that the negligence of the defendant caused his death.

**§ 45. Miscellaneous Employes.**—A gardner who was employed by a common carrier by railroad of interstate commerce, in taking care of the depot premises and burning trash gathered in the yard was held not to be employed in interstate com-

76. *Robinson v. Baltimore & O. R. Co.*, 40 App. Cas. (D. C.) 169.

77. *Missouri, K. & T. R. Co. v. West*, — Okla. —, 134 Pac. 655.

78. *Missouri, K. & T. R. Co. v. Blalack*, 105 Tex. 296.

merce.<sup>79</sup> In an action under the federal act a petition alleged that the defendant railroad company was a common carrier engaged in interstate commerce; that as a part of its interstate transportation it owned and operated a telegraph line using it for the purpose of directing the operation of trains; that the plaintiff was employed by the company in repairing this line and was injured while doing so. The court held that the petition pleaded sufficient facts to show that the plaintiff was engaged in interstate commerce.<sup>80</sup> A watchman on a "dead" locomotive engine being transported in an interstate train was held to have been engaged in interstate commerce.<sup>81</sup> A laborer employed in carrying coal to heat the stoves in a car repair shop of a common carrier by railroad where other employes were engaged in repairing rolling stock used interchangeably in transporting intrastate and interstate commerce, was held to be within the protection of the federal act.<sup>82</sup>

**§ 46. Instances Where Employes Were Engaged in Interstate Commerce but Erroneously Held to Have Been Engaged in Intrastate Commerce.**—Since the decisions of the United States Supreme Court in the Pedersen, Seale, Walsh, Zachary and Behrens cases<sup>83</sup> some uncertainty as to when a railroad em-

79. *Galveston, H. & S. A. Ry. Co. v. Chojnacky*, — Tex. Civ. App. —, 163 S. W. 1011.

80. *Deal v. Coal & Coke Ry. Co.*, 215 Fed. 285.

81. *Atlantic C. L. R. Co. v. Jones*, 9 Ala. 499, 6 N. C. C. A. 26n, 80n, 192n.

82. *Cousins v. Illinois C. B. Co.*, — Minn. —, 6 N. C. C. A. 182, 148 N. W. 58.

83. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n; *St. Louis, S. F.*







ployee is engaged in interstate commerce has been removed and decisions in conflict with the rulings in these cases are erroneous for the final arbiter as to when a railroad servant is employed in interstate commerce is the national Supreme Court. Some of these erroneous decisions will now be briefly reviewed.

The Georgia Court of Appeals held that a member of a track gang repairing the track on a railroad carrying both intrastate and interstate commerce was not engaged in interstate commerce.<sup>84</sup> This decision is contrary to the decision in the Pedersen case, *supra*. The Supreme Court of Wisconsin held that a boiler maker repairing a boiler of a derrick car on a wrecking train was not engaged in interstate commerce.<sup>85</sup> It appeared from the evidence that this wrecking train was used in clearing wrecks on a track used for the transportation of interstate commerce not only in one state but in other states as well for the railroad company. The court in this decision cited and followed the decision of the Federal Circuit Court of Appeal in deciding the Pedersen case which was later overruled by the national Supreme Court. The decision of the court in the

& T. R. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n; Walsh v. New York, N. H. & H. R. Co., 223 U. S. 5, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. Ed. 1051, 6 N. C. C. A. 189n, Ann. Cas. 1914 C 163n.

84. Charleston & W. C. Ry. Co. v. Anchors, 10 Ga. App. 329.

85. Ruck v. Chicago, M. & St. P. Ry. Co., 153 Wis. 158, 6 N. C. C. A. 204n.

Ruck case is not in harmony with the controlling rulings of the national courts. And in still a later case the Supreme Court of Wisconsin held that hostlers in roundhouses working on engines used indiscriminately in carrying both interstate and intrastate commerce were not employed in interstate commerce.<sup>86</sup> This decision too is in conflict with the rulings of the national courts.

The New Jersey court of appeals decided that an employe unloading new rails with which the track was to be repaired was not engaged in interstate commerce. Assuming that the proof in that case developed what is true of practically every railroad in the United States, that interstate and intrastate commerce were carried over the track indiscriminately, the court's ruling was wrong.<sup>87</sup> The same court in a later case held that an employe was engaged in intrastate commerce when he was clearly under the facts engaged in interstate commerce.<sup>88</sup> The plaintiff in that case was injured while placing a cover over the mechanism of a switch which he had just oiled. The switch connected two lines of track, one used for freight and the other for passenger trains for either interstate or intrastate business as the business necessities of the railroad company required. While so engaged the plaintiff was struck by a car which was not at the time being used for the transportation of freight nor did it

86. *Gray v. Chicago & N. W. Ry. Co.*, 153 Wis. 636, 4 N. C. C. A. 225n.

87. *Pierson v. New York, S. & W. R. Co.*, 83 N. J. L. 661.

88. *Granger v. Pennsylvania R. Co.*, — N. J. L. —, 86 Atl. 264.





appear that the movement of the car had any relation to the making up of a train for the purpose of engaging in interstate commerce. It was held that the plaintiff's cause of action was not governed by the federal act and that he was not engaged in interstate commerce. This ruling was erroneous for the reason that the switch on which plaintiff was working had a direct and immediate connection with interstate commerce. The question whether the car was being used in interstate commerce was entirely immaterial for the reason that the federal act includes causal negligence of agencies used wholly in intrastate commerce.<sup>89</sup>

A federal district court held that a carpenter working on a railroad bridge on a track carrying both kinds of commerce was not engaged in interstate commerce.<sup>90</sup> This case is in effect overruled by the decision of the United States Supreme Court in the Pedersen case. The Supreme Court of Nebraska held that an engineer running a "light" engine between two points in that state, which, the defendant claimed, was ultimately destined to a point in another state, was not engaged in interstate commerce.<sup>91</sup> Under the ruling of the Supreme Court in the Zachary case, *supra*, an employe hauling empty

89. Second Employers' Liability Cases, 223 U. S. 1, 56, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; Pedersen v. Delaware, L. & W. Ry. Co., 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n; Colasurdo v. Central R. Co. of New Jersey, 180 Fed. 832; s. c., 113 C. C. A. 379, 192 Fed. 901. Section 20, *supra*.

90. Taylor v. Southern Ry. Co., 178 Fed. 380.

91. Wright v. Chicago, R. I. & P. R. Co., 94 Neb. 317, 6 N. C. C. A. 183n.

cars from a point in one state to a point in another is engaged in interstate commerce and the ruling in the Wright case is wrong if the engine was destined to another state and it matters not that the employe was not going beyond the state. It is not, however, very clear in the report of the case whether the engine was on its way to machine shops in another state. In a case decided by the Supreme Court of Louisiana a hostler working on an engine in a round-house which had just returned from an intrastate journey, was held not engaged in interstate commerce.<sup>92</sup> But the evidence also disclosed that on the previous day the engine had been used in transporting interstate commerce and it was used indiscriminately in hauling both kinds of commerce. The court held that a hostler repairing engines employed indiscriminately in moving both interstate and intrastate commerce, was not engaged in interstate commerce. This decision too is not in harmony with the rulings of the national courts.

**§ 47. Instances Where Employes Were Engaged Exclusively in Intrastate Commerce but Erroneously Held by the Courts to Have Been Engaged in Interstate Commerce.**—In the cases discussed in the preceding paragraph the courts erroneously held that the employes were engaged in intrastate commerce. There are other cases where employes were engaged exclusively in intrastate commerce but were erroneously held by the courts to have been engaged in interstate commerce.

92. *LaCasse v. New Orleans, T. & M. R. Co.*, — La. —, 6 N. C. C. A. 196n, 437n, 64 So. 1012.









The Supreme Court of Oregon decided that a member of a switching crew while coupling a switch engine to a private car used wholly within the state in intrastate commerce and injured while so working, was employed in interstate commerce. The proof, however, disclosed that the switching crew was engaged indiscriminately in moving cars containing both intrastate and interstate commerce but at the time of receiving the injury they were engaged solely in moving the intrastate car mentioned.<sup>93</sup> Although the decision in this case was handed down after the opinion of the Supreme Court of the United States in the Behrens case,<sup>94</sup> that case was not called to the attention of the court and no doubt a different conclusion would have been reached had the court considered the facts in the light of the ruling in the Behrens case.

The Supreme Court of Minnesota held that a freight conductor was engaged in interstate commerce when under the facts it seems that he was engaged in intrastate commerce.<sup>95</sup> The evidence in that case disclosed that the injured conductor was generally employed in interstate commerce. But at the time he was injured in a head-end collision the train did not contain any interstate commerce and was moving between two points in the same state. At the time of the accident he had in his train the

93. *Oberlin v. Oregon W. R. & N. Co.*, — Ore. —, 6 N. C. C. A. 75n, 79n, 95n, 188n, 142 Pac. 554.

94. *Illinois C. R. Co. v. Behrens*, 223 U. S. 473, 58 L. Ed. 1051, 6 N. C. C. A. 189n, Ann. Cas. 1914 C 163n.

95. *Peery v. Illinois C. R. Co.*, 123 Minn. 264, 6 N. C. C. A. 184n; s. c., — Minn. —, 150 N. W. 382.

engine, way car and also another disabled locomotive. No facts appeared as to the use of the disabled locomotive. Under these circumstances the conductor is presumed to have been engaged in intrastate commerce.<sup>96</sup> In another case a federal district court held that a switching crew generally engaged in moving interstate commerce but at the time employed in moving intrastate commerce solely, was engaged in interstate commerce within the meaning of the federal act.<sup>97</sup> But this case was reversed when it reached the Supreme Court of the United States.

**§ 48. Employees Presumed to Be Engaged in Intrastate Commerce.**—Until the contrary is alleged or shown, it will be presumed in an action for injuries to a railroad employe through the negligence of his employer in the use or operation of its railway within the state, that he was engaged in intrastate commerce and that he is seeking a remedy under the laws of the state.<sup>98</sup> But another court held that in such actions the court will take judicial notice that the railroad company was engaged in interstate commerce.<sup>99</sup>

**§ 49. Intrastate Employees Injured by Negligence of Interstate Employees or Instrumentalities of Interstate Commerce Have No Remedy Under Federal Act.**—When a servant is employed exclusively in in-

96. Section 48, *infra*.

97. Behrens v. Illinois C. R. Co., 192 Fed. 581, 3 N. C. C. A. 781n, 783.

98. Bradbury v. Chicago, R. I. & P. Ry. Co., 149 Iowa 51; Erie R. Co. v. Welsh, — Ohio —, 6 N. C. C. A. 77n, 188n, 105 N. E. 190n; Chicago, R. I. & P. Ry. Co. v. McBee, — Okla. —, 145 Pac. 331.

99. McIntosh v. St. Louis, S. F. R. Co., — Mo. App. —, 168 S. W. 821.





trastate commerce at the time of his injury, he has no remedy under the federal act, although injured by another employe engaged at the time in interstate commerce or by instrumentalities or appliances used at the time in interstate commerce, as for instance, an interstate train on an interstate highway; because under such conditions the employe himself is not, at the time of the injury, engaged in interstate commerce. Under the very terms of the act a recovery is limited to employes who are injured "while" employed in interstate commerce. Under the conditions named, it is true that the carrier is engaged in interstate commerce but the injured employe is not. However, as pointed out in another paragraph, if the employe is engaged in interstate commerce at the time of his injury although the employe whose negligence caused the injury is engaged exclusively in intrastate commerce or the instrumentality causing the injury is being used solely in intrastate commerce, the injured employe's remedy is nevertheless controlled by the federal act.<sup>100</sup>

**§ 50. Decisions Construing Federal Safety Act Not Always Applicable in Construing Employers' Liability Act.**—In determining when an employe is engaged in interstate commerce under the Federal Employers' Liability Act, some courts have been led into error by following federal decisions construing the Federal Safety Appliance Act. Such decisions

100. *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832, affirmed in 192 Fed. 901; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n.



may or may not be applicable, depending altogether whether they were construing that act as it was before the amendment of 1903 or since. Prior to the 1903 amendment to the Safety Appliance Act, it was necessary for the plaintiff to prove in order to recover for an injury due to a violation of that law, that the car having a defect, was at the time of the injury "hailed or permitted to be hauled or used on its line in moving interstate traffic." Decisions construing the act as it thus read would no doubt throw light on some questions under the liability act. But since the amendment of 1903, the Federal Safety Appliance Act is very much broader than the Employers' Liability Act for by that amendment every interstate railroad is required to equip all its cars as provided by the safety act whether used in intrastate or interstate commerce. This broad exercise of power extending the Safety Appliance Act to all cars on interstate highways by railroad has been sustained by the national Supreme Court.<sup>1</sup> As practically all railroads in the United States are interstate highways, the Safety Appliance Act applies to all cars on such railroads. The decision cited in the notes holding that even cars used in intrastate commerce are included within the provisions of the Safety Appliance Act has sometimes been cited as throwing light on the proposition as to when an employe is engaged in interstate commerce under the Federal Employers' Liability Act. Such de-

1. *Southern Ry. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 3 N. C. C. A. 822; *Southern Ry. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 6 N. C. C. A. 94n; *Stearns v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 148 N. W. 128.







cisions are not applicable for if an employe is injured while working on cars hauling only intrastate traffic on an interstate railroad due to any violation of the Federal Safety Appliance Act, he has his remedy under that statute although he was not engaged at the time in interstate commerce.<sup>2</sup>

**§ 51. When Questions of Employment in Interstate Commerce Should Be Submitted to Jury.**—Where, under all the evidence in the case, any essential matter bearing on the question of whether the employe was at the time of the injury engaged in interstate commerce, is in doubt, the question should be submitted to the jury under proper instructions.<sup>3</sup> In an action for damages under the federal act the plaintiff may state a cause of action under one count under the state law and in another count under the federal act and if the evidence is such at the close of the introduction of the testimony that it is doubtful in which commerce he was engaged, it becomes a mixed question of law and fact to be submitted to the jury under proper instructions.<sup>4</sup> But the Supreme Court of Oregon held that it was error to submit to the jury whether the common law, state law or federal act, applied.<sup>5</sup>

2. Southern Ry. Co. v. United States, 222 U. S. 20, 56 L. Ed. 72, 3 N. C. C. A. 822.

3. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n, reversing same case on other grounds reported in 156 N. C. 496; *accord*, Southern P. Ry. Co. v. Vaughan, — Tex. Civ. App. —, 165 S. W. 885.

4. Atkinson v. Bullard, — Ga. App. —, 6 N. C. C. A. 80n, 183n, 80 S. E. 220. See § 172, *infra*.

5. Oberlin v. Oregon W. R. N. Co., — Ore. —, 6 N. C. C. A. 75n, 79n, 95n, 188n, 142 Pac. 554.

If it appears at the close of the evidence as a matter of law which statute applies, no doubt it would be error to submit the question to the jury as the court should pass on all questions of law; but if the evidence is such that reasonable men could draw different conclusions as to whether the defendant and the injured employe were engaged in intrastate commerce or interstate commerce, then it would be error for the court to decide that issue as all questions of facts should be submitted to the jury under proper charges declaring the law applicable. The conflict between the decisions cited is more apparent than real.<sup>6</sup>

6. *Patry v. Chicago & W. I. Ry. Co.*, — Ill. —, 106 N. E. 105, reversing same case reported in 185 Ill. App. 361; *Atchison, T. & S. F. Ry. Co. v. Pitts*, — Okla. —, 145 Pac. 1148.





## CHAPTER IV

### RAILROADS INCLUDED WITHIN THE FEDERAL ACT

- § 52. General Rule as to When Railroad Companies Are Engaged in Interstate and Foreign Commerce.
- § 53. Railroads Within the Act Defined.
- § 54. Railroad Must Be a Common Carrier—Tap Lines and Logging Roads.
- § 55. Proof That Injured Servant Is Employed in Interstate Commerce Sufficient to Show That the Railroad Is So Engaged.
- § 56. Receivers of Railroad Corporations Included Within the Act.
- § 57. Lessor of Railroad Engaged in Interstate Commerce Liable, When.
- § 58. Interurban Electric Railroads Included Within the Act.
- § 59. Railroads Carrying Passengers and No Freight.
- § 60. Ships or Vessels Not a Part of a Railroad System.
- § 61. Street Railroads Not Within the Terms of the National Act.
- § 62. Hauling Empty Cars or Company Property Over State Line.
- § 63. Instances Showing Engagement by Railroad Companies in Interstate Commerce.
- § 64. Beginning and Ending of Interstate Character of Shipments.
- § 65. Intermediate Carrier with Line Wholly in One State Participating in Movement of Interstate Shipments.
- § 66. Shipments Between Two Points in Same State Passing Through Another State in Transit.
- § 67. Railroad Lines Confined Within Limits of a Single State Engaged in Interstate Commerce When Transporting Through Shipments To or From Another State.
- § 68. When Reshipment from Point of Delivery Changes Interstate Character of Traffic.
- § 69. When Reshipment from Point of Delivery Does Not Change Interstate Character of Traffic.
- § 70. All Carriers by Railroad and All Their Employes Within Territories Included.

**§ 52. General Rule as to When Railroad Companies Are Engaged in Interstate and Foreign Com-**



**merce.**—If a common carrier by railroad transports passengers, freight, express, baggage or other merchandise from one state in the United States to another, or from a state or territory to a territory or *vice versa*, or from the District of Columbia to a state or territory or *vice versa*, or from a state or territory to a foreign nation or *vice versa*, the carrier is engaged in interstate commerce or foreign commerce within the meaning of the Federal Employers' Liability Act. Carriers engaged in foreign commerce while within the boundary of the United States are included in the act as well as carriers engaged in interstate commerce.

**§ 53. Railroads Within the Act Defined.**—The Federal Employers' Liability Act is confined solely to common carriers engaged in interstate commerce by *railroad*. The Hepburn Amendment of 1906 to the Interstate Commerce Act (Act June 20, 1906, c. 3591, 34 Stat. 584 [Fed. Stat. Ann. 1909 Supp. p. 255]) provides that a railroad, as used in that act, shall include "all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation or delivery of any of said property." It would seem that this definition following the application of analogous principles by the courts in other cases, would apply in construing what is or is not a railroad within the





meaning of the national act though the question has not apparently been directly passed upon.

The Federal Circuit Court of Appeals for the sixth circuit in 1904, construing the Safety Appliance Act decided that the Interstate Commerce Act and the Safety Appliance Act were *in pari materia* so that the definition of a railroad given in the former controlled in construing the latter.<sup>1</sup> After the passage of the Hepburn Amendment, which defined a railroad within the meaning of the Interstate Commerce Act as quoted herein, it was held in another case that this definition of a railroad governed in construing what was a railroad under the Safety Appliance Act and the court decided that a private switch leading to a mill used by a railroad company in transporting cars in interstate commerce to and from the mill as they were consigned, with the railroad's own engines and cars constituted a "railroad" within the meaning of the Safety Appliance Act.<sup>2</sup>

**§ 54. Railroad Must Be a Common Carrier—Tap Lines and Logging Roads.**—In order to recover under the national act, the injured employe must not only show that the defendant owned or operated a railroad, but he must further show that such railroad is operated as a common carrier.<sup>3</sup> A common

1. United States v. Geddes, 65 C. C. A. 320, 131 Fed. 452.

2. Gray v. Louisville & N. R. Co., 197 Fed. 874, 4 N. C. C. A. 484n.

3. Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; Pedersen v. Delaware, L. & W. Ry. Co., 229 U. S. 146, 57 L. Ed. 1125, 6 N. C. C. A. 198n, 924n, Ann. Cas. 1914 C 153n; Bay v. Merrill & Ring Lumber Co., 211 Fed. 717.

carrier is one who undertakes to transport for hire from one place to another, passengers or goods of such as choose to employ him.<sup>4</sup> A company owned a tract of timber land which it was engaged in logging and also owned a railroad on which it transported its logs from the woods to Puget Sound, eighty per cent of the output being shipped to other states or countries. The company's articles of incorporation authorized it to do business as a common carrier; but in fact the services rendered on its road had all been private and only for the purpose of carrying the logs to the Sound. The court held that the transportation of the logs did not constitute interstate commerce within the rule that a commodity is not engaged in interstate commerce until it is entered on its final passage to another state or foreign country and hence the company was not liable under the Federal Employers' Liability Act.<sup>5</sup>

Shortly after this decision was handed down on February 20, 1914, the Supreme Court of the United States in May, 1914, decided the tap line cases.<sup>6</sup> In those cases, the question was whether certain log-

4. *Nordgard v. Marysville & N. Ry. Co.*, 211 Fed. 721, 6 N. C. C. A. 207n, affirmed in 218 Fed. (C. C. A.) 737, Judge Ross dissenting on the proposition as to whether the railroad was a common carrier; 2 Words & Phrases, 1312; *Jackson, etc., Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432; *Fort Worth B. Ry. Co. v. Perryman*, — Tex. Civ. App. —, 6 N. C. C. A. 204n, 158 S. W. 1181.

5. *Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717; *Nordgard v. Marysville & N. Ry. Co.*, 211 Fed. 721, 6 N. C. C. A. 207n; the *Daniel Ball Case*, 10 Wall. (U. S.) 557, 19 L. Ed. 999; *Coe v. Errol*, 116 U. S. 517, 525, 29 L. Ed. 715.

6. *Atchison, T. & S. F. R. Co. v. Victoria, F. & W. R. Co.*, 234 U. S. 1, 58 L. Ed. 1185.







ging railroads in Louisiana were common carriers by railroad or were mere "plant facilities" as that doctrine has been expounded by the Interstate Commerce Commission and the courts. The proof was different from that in the Bay case, *supra*, as the evidence disclosed that these roads held themselves out as common carriers to some extent though most of the traffic consisted of the logs and timbers belonging to the owners of the roads. The Supreme Court held that they were common carriers by railroad and that the extent to which a railroad is in fact used by the public does not determine whether it is a common carrier, but the right of the public to demand services of it is the criterion to determine whether the roads were plant facilities or common carriers. An order of the Interstate Commerce Commission prohibiting these tap lines from sharing in rates on commodities shipped over them on the ground that they were not common carriers, was set aside.

**§ 55. Proof That Injured Servant Is Employed in Interstate Commerce Sufficient to Show That the Railroad Is So Engaged.**—To permit an employe to recover under the federal act, it must be shown that at the time of the accident, first, the carrier was engaged in interstate commerce and, second, that the injured servant was employed by it in such commerce. Since the act of a servant within the scope of his employment is in legal contemplation the act of the master, if it is shown that the injured employe at the time of the accident was engaged in interstate commerce by virtue of his employment on the rail-

road, then it necessarily follows that the carrier is so engaged. Hence in an action under the act, evidence that the employe was employed in such commerce at the time of the accident is sufficient to show that the carrier was so engaged.

But the converse of the proposition stated is not true, for proof that the carrier at the time of the injury was engaged generally in interstate commerce, does not prove that the injured servant was also employed by it in such commerce unless the specie of evidence introduced to show the carrier was so engaged, is the act and work of the servant when injured. Since, therefore, by virtue of a well-known principle in the law of agency the act of servant is the act of master, decisions of the courts construing when an employe is engaged in interstate commerce, are quite applicable under questions discussed in this chapter and opinions there cited are relevant here.<sup>7</sup>

**§ 56. Receivers of Railroad Corporations Included Within the Act.**—It is provided in § 7 of the federal act that the term “common carrier” in the first section of the act shall include the receiver or receivers or other persons or corporations charged with the management and operation of the business of a common carrier. Courts have both affirmed<sup>8</sup> and denied<sup>9</sup> the proposition that it is necessary for the plaintiff to show by proof that the receiver has

7. *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

8. *Hudkins v. Bush*, 69 W. Va. 194, Ann. Cas. 1913 A 533n.

9. *McNulta v. Ensich*, 134 Ill. 46; *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362, aff'g 32 Ill. App. 86.





been duly appointed, is in charge of and has authority to operate the railroad. In view of this conflict the "safety first" propaganda as applied to legal procedure would seem to suggest to the careful practitioner, if representing the plaintiff, that he obtain a certified copy of the receiver's appointment and authority and offer it in evidence.

**§ 57. Lessor of Railroad Engaged in Interstate Commerce Liable, When.**—If, under the laws of the state, the lessor of a railroad remains responsible for the acts of the lessee as is provided by the statutes of several states, a railroad company which leases its entire line to another railroad company doing an interstate business, creates the lessee its agent and the lessor is a common carrier by railroad engaging in interstate commerce, and the federal act controls as to its liability for injuries to employes of the lessee engaged in interstate commerce. This is true even though the railroad leased is confined within the boundaries of one state. Both such companies, while the lessee is engaged in interstate commerce, are within the terms of the national statute.<sup>10</sup>

In the Zachary case, cited, the deceased locomotive fireman was an employe of the Southern Railway Company, the lessee of the defendant in the case. The lessor's activity in the operation of the railroad was confined solely to receiving annual rents from the Southern Railway Company and distrib-

10. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n; Copper River & N. W. Ry. Co. v. Heney (C. C. A.), 211 Fed. 459; Nordgard v. Marysville & N. Ry. Co., 211 Fed. 721, 6 N. C. C. A. 207n; Campbell v. Canadian N. Ry. Co., — Minn. —, 4 N. C. C. A. 216n, 217n, 144 N. W. 772.

uting them among its stockholders. The state law of North Carolina provided that the lessor of a railroad, notwithstanding the lease, was liable for all of the lessee's acts of commission and omission in operating the road, although the lessor was not actually engaged in either. Construing such leases under the Federal Employers' Liability Act, the court said: "It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employes as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between the states,' and that the deceased was 'employed by such carrier in such commerce,' within the meaning of the federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed."

But the Supreme Court of Illinois held, in a case decided ten months after the opinion in the Zachary case was delivered, that under the federal act the







owner of a railroad track was not liable to an employe of a licensee of the same track, both being engaged in interstate commerce, for the reason that the relation of master and servant did not exist between the employe of the licensee and the owner of the track.<sup>11</sup> In the Wagner case, A, a railroad company and the defendant in the case, owned a Y-track which was a part of its tracks on a certain street in Chicago. This Y-track ran northeast and connected at one end with the tracks belonging to B and at the other end with tracks belonging to C. Alongside of the Y-track and on A's property was a semaphore post 16 feet high which however was erected by and belonged to C. The plaintiff, a conductor in charge of a switching crew, was an employe of D. At the time of his injury he was assisting in the movement of interstate cars and was hanging on the side of a car on the Y-track when owing to its close proximity, he was struck by the semaphore post and was severely injured. D company used the Y-track and had been using it for several years to transfer its cars and to make deliveries to other companies. The track was used by D with the consent of A and nearly every month D had received a bill from A for the use of this track and regularly paid the same. The semaphore post had been in the same place for several years. While on A's property and close to the Y-track on which plaintiff was injured, the post was not maintained

11. *Wagner v. Chicago & A. R. Co.*, — Ill. —, 106 N. E. 809, decided December 2, 1914. All of the judges in this case concurred in the ruling but two judges dissented on another point.

or controlled by A or D but by C whose tracks connected with the Y-track at one end. Although the semaphore was not erected or maintained by it, the court held that A was liable if it permitted it to negligently remain there; that A and D were joint tort-feasors and that A was negligent in permitting the operation of trains by its licensee D over the track. On the question of A's liability, being the sole defendant, under the Federal Employers' Liability Act to the plaintiff, the employee of D, the court said: "Defendant in error had no cause of action against plaintiff in error under the Federal Employers' Liability Act, as that act applies only where the relation of master and servant exists."

**§ 58. Interurban Electric Railroads Included Within the Act.**—Interurban electric railroad companies carrying passengers, express or freight from one state to another are included within the terms of the Federal Employers' Liability Act. An interurban electric railway company which operated a line from a point in Kansas to a point in Missouri was engaged in interstate commerce although after reaching Kansas City, Kansas, and then into Kansas City, Missouri, a street car company furnished the electric power and the conductor, and the interurban company, the motorman, and the cars were run over the tracks of the street railway company.<sup>12</sup>

**§ 59. Railroads Carrying Passengers and No Freight.**—Although a common carrier by railroad carries only passengers from one state to another

12. *McAdow v. Kansas City W. Ry. Co.*, — Mo. App. —, 6 N. C. C. A. 76n, 206n, 233n, 164 S. W. 188.





and handles no freight, it is nevertheless engaged in interstate commerce within the terms of the federal act.<sup>13</sup>

**§ 60. Ships or Vessels Not a Part of a Railroad System.**—While the first section of the Act of 1908 includes a railroad company's boats used in interstate commerce and makes it liable for defects or insufficiencies in such boats, due to negligence, causing injuries to its employes while employed in such commerce, yet the federal statute does not apply to a vessel not a part of a railroad system.<sup>14</sup> On the other hand a ferryboat used by a railroad company in the transportation of freight and passengers from Jersey City across the river to New York state, is used in interstate commerce within the meaning of the federal statute.<sup>15</sup> In the last case cited the court also held that the Federal Employers' Liability Act did not by implication repeal the federal statutory provision permitting shipowners to limit the liability as applied to actions for injuries to employes on a vessel operated by a railroad company as a part of its interstate line.<sup>16</sup> It was also held by the court in that case that a company could maintain proceedings for such limitation in a court of admiralty.

**§ 61. Street Railroads Not Within the Terms of the National Act.**—Street railways which transport passengers or freight across state lines or from one state to another, are not included within the terms

13. *Washington Ry. Co. v. Downey*, 40 App. Cas. (D. C.) 147.

14. *The Pawnee*, 205 Fed. 33.

15. *The Passaic*, 190 Fed. 644, affirmed in 122 C. C. A. 466, 204 Fed. 266.

16. Section 4283 R. S. (4 Fed. Stat. Ann., p. 839).

of the act for the statute mentions only common carriers "by railroad" and the United States Supreme Court has defined the term "railroad" by interpretation as not including street railroads.<sup>17</sup> The same conclusion was reached by the Kansas City Court of Appeals in a case brought under the Federal Employers' Liability Act.<sup>18</sup> In the case cited before the United States Supreme Court, counsel for appellant cited decisions from twelve states, holding that in a statute the word "railroad" did not mean "street railroads" and the counsel for defendant cited decisions to the contrary from an equal number of states. A similar disagreement was shown in the briefs in federal tribunals. Speaking of this conflict among the decisions of the various courts, Justice Lamar, speaking for the court said: "This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word railroad includes street railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that railroad does not include street railroad unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, 'a street railroad, in a technical and popular sense, is as different

17. *Omaha & C. B. S. Ry. Co. and Omaha & C. B. Ry. & B. Co. v. Interstate Commerce Commission and United States*, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385n, reversing the same case reported in 191 Fed. 40, 179 Fed. 243, 17 Interst. Com. Com'n R., 239.

18. *McAdow v. Kansas City W. Ry. Co.*, — Mo. App. —, 6 N. C. C. A. 76n, 206n, 233n, 164 S. W. 188.







from an ordinary railroad as a street is from a road.' *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175. But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce."

**§ 62. Hauling Empty Cars or Company Property Over State Line.**—A common carrier by railroad while transporting empty cars or cars containing only property owned by the railroad company from one state to another is engaged in interstate commerce within the meaning of the national statute.<sup>19</sup>

**§ 63. Instances Showing Engagement by Railroad Companies in Interstate Commerce.**—A common

19. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n; *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486; *Barker v. Kansas City, M. & O. Ry. Co.*, 88 Kan. 767, 43 L. R. A. (N. S.) 1121; *Kansas City R. Co. v. Cook*, 100 Ark. 467; *Thompson v. Wabash R. Co.*, — Mo. —, 171 S. W. 364.

carrier by railroad was held to be engaged in interstate commerce, through its servant, a car repairer, while he was repairing a car used indiscriminately in both interstate and intrastate commerce in a repair shop of the railroad company.<sup>20</sup> In making a shipment from a point in one state to a point in another state over a line which passed through another state the company was engaged in interstate commerce although the point of origin and point of destination was in the same state.<sup>21</sup> A car marked "in bad order" and containing an interstate shipment was placed upon a repair track in a terminal yard of a railroad company at the destination point for the purpose of having repairs made. While on such a track, it was held, that the railroad company was engaged in interstate commerce through one of its servants who was injured while attempting to couple the defective car to another car under the direction of his foreman.<sup>22</sup>

**§ 64. Beginning and Ending of Interstate Character of Shipments.**—From the moment that a shipment for a point in another state is delivered to and accepted by a railroad company, that carrier is engaged in interstate commerce during the entire period from the time of acceptance at point of origin until the shipment is finally delivered to and accepted by the consignee at point of destination.<sup>23</sup>

20. *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.

21. *Louisville & N. Ry. Co. v. Allen*, 152 Ky. 145; s. c., 152 Ky. 837.

22. *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 4 N. C. C. A. 488n.

23. *McNeil v. Southern Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142; *Chicago, R. I. & P. R. Co., v. Hardwick Farmers Elevator Co.*, 226





**§ 65. Intermediate Carrier with Line Wholly in One State Participating in Movement of Interstate Shipments.**—If any common carrier by railroad participates to any extent in moving traffic originating from a point in one state or territory or the District of Columbia and destined to a point in another state or territory, the carrier so participating, is engaged in interstate commerce, although its line is confined between two points in the same state and although it only receives a division under a joint rate of transportation for its services. In other words, any railroad that carries over its line freight billed from a point in one state to a point in another as a part of the journey, such intermediate carrier is engaged in interstate commerce as well as the initial and final carrier of a through shipment.<sup>24</sup>

**§ 66. Shipments Between Two Points in Same State Passing Through Another State in Transit.**—Although a shipment is made from a point in one state to another point in the same state, yet if in being transported between the two points the traffic is carried through a contiguous state, the carrier is engaged in interstate commerce and such shipments are considered interstate shipments. Conflicting

U. S. 426, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. Ed. 363, 3 N. C. C. A. 784, 802n, 829n; *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452; *United States v. Union Stock Yards & T. Co.*, 226 U. S. 300, 57 L. Ed. 232, affirming on this point decision of Court of Appeals reported in 192 Fed. 330.

24. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 162 U. S. 184, 40 L. Ed. 935; *United States v. Standard Oil Co.*, 155 Fed. 306; *Parsons v. Chicago N. W. Ry. Co.*, 167 U. S. 447, 42 L. Ed. 232.



opinions by state and federal courts on this question had been rendered but the final and supreme authority on such matters, the United States Supreme Court, decided that traffic so moved was interstate commerce.<sup>25</sup>

**§ 67. Railroad Lines Confined Within Limits of a Single State Engaged in Interstate Commerce When Transporting Through Shipments to or from Another State.**—Although a railroad line of a company is confined wholly within the limits of a single state, yet if such a carrier accepts freight for shipment to or from another state, such carrier is engaged in interstate commerce. This is true although the shipment is made without any common control, management or arrangements with another carrier for continuous carriage and although the line of such carrier does not pass from one state to another. Whether such carriers, operating entirely within a single state and transporting articles of commerce shipped in continuous passage from places without the state to stations on its road, or from stations on its road to points without the state, free from any common control, management or arrangements with another carrier for a continuous carriage or shipment, are engaged in interstate commerce, has been both denied and affirmed by Federal Circuit Court of Appeals.<sup>26</sup>

This controversy arose largely from a disagreement between the courts in interpreting the defini-

25. *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617, 47 L. Ed. 333; *Louisville & N. Ry. Co. v. Allen*, 152 Ky. 145, overruling the same case reported in 152 Ky. 837; *Deardorff v. Chicago, B. & Q. R. Co.*, — Mo. —, 172 S. W. 333.

26. So held in *United States v. Colorado N. W. R. Co.*, 85 C. C. A.





tion of a railroad given in the Interstate Commerce Act before the Hepburn Amendment of 1906.<sup>27</sup> In the Geddes case, cited in the notes, it was held that the phrase "common control, management or arrangements" applied to carriers wholly by railroad as well as those partly by railroad and partly by water. In the other cases cited in the notes, it was held that the phrase quoted only applied to carriers partly by railroad and partly by water. Which of these courts was correct need not now concern a lawyer bringing a suit under the Federal Employers' Liability Act for the reason that the act was amended in 1906 so that the clause "under a common control, management or arrangements" now qualifies only carriers partly by a railroad and partly by water and has no application to carriers wholly by railroad.<sup>28</sup> The decision of the Federal Circuit Court of Appeals for the Eighth Circuit (*United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167n, 13 Ann. Cas. 893),

27, 157 Fed. 321, 15 L. R. A. (N. S.) 167n, 13 Ann. Cas. 893; *United States v. Colorado & N. W. R. Co.*, 157 Fed. 342; *United States v. Union Stockyard & Transit Co.*, 192 Fed. 330. Denied in *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452; *United States v. Geddes*, 180 Fed. 480.

27. Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (3 Fed. Stat. Ann., p. 809). That definition was as follows: "The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to another state or territory of the United States, or the District of Columbia."

28. Act of June 29, 1906 c. 3591, § 1 and § 11, 34 Stat. 584, 595 (Fed. Stat. Ann. 1909 Supp., p. 255).

therefore may be said to properly declare the law as to the carriers mentioned, and the opinion in the Geddes case, if correct under the old statute, is no longer the law in view of the amendment. It is quite evident also from recent decisions of the United States Supreme Court that such carriers whose lines are confined within the limits of a single state and who receive shipments from or to another state although without any through billing, are engaged in interstate commerce.<sup>29</sup>

**§ 68. When Reshipment from Point of Delivery Changes Interstate Character of Traffic.**—When a shipment from point A in one state to point B in another state, is delivered to and accepted by the consignee at B and the consignee thereafter reships such a commodity from B to C in the same state—the line between the two points being wholly within the two states—the last shipment is an intrastate one and the carrier in hauling it between B and C is not engaged in interstate commerce. For the interstate shipment under such conditions was concluded and determined by a final delivery at B, the place intended by the shipper and carrier for final delivery. For instance, a car of corn was carried upon a bill of lading from Hudson, South Dakota, to Texarkana, Texas, and five days afterwards it was reshipped from Texarkana to Goldthwaite, both points being in the state of Texas. It was sought to hold the railroad company liable for violation of the

29. *Baer Bros. Mer. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055; *United States v. Union Stockyards*, 226 U. S. 286, 57 L. Ed. 232, also the same case reported in 192 Fed. 330.







regulations of the state railroad commission applicable to intrastate carriers in the state of Texas. On the other hand the railroad company contended that the shipment was interstate from Hudson to Goldthwaite. The court held that the shipment from Texarkana to Goldthwaite was an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite, for the corn had been carried to Texarkana upon a contract for interstate shipment and the reshipment five days later upon a new contract was an independent intrastate shipment.<sup>30</sup>

A close case on the facts in which the same principle was applied, was decided by the Kentucky Court of Appeals. A train consisting of 19 empty coal cars were brought into Russellville, Kentucky, some of the cars having been brought from Tennessee. The conductor of the train in which the cars were brought to Russellville, had been directed to take the cars to Russellville and no further orders had been given for their destination and no one had orders to carry them further. After reaching Russellville a new order was issued directing that they be taken to another point in the same state. Decedent was a flagman on the train leaving Russellville and each car in the train including the coal cars were destined to another point within the same state. The court held that the interstate journey of the cars ended at Russellville and that after leaving Russellville the train was moving solely in intrastate commerce and that no action for decedent's

30. *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403, 51 L. Ed. 540.

death could be maintained under the federal statute. The court properly assumed that hauling even empty coal cars from a point in one state to a point in another constituted interstate commerce, but in view of the controlling fact that the cars originating in Tennessee were only destined to Russellville, and that at the latter point orders were issued for their further destination which was in the same state, that the interstate journey ended at Russellville.<sup>31</sup>

In another case a coal company shipped a car of coal over certain railroads from points in Illinois to Davenport, Iowa, and there reshipped the cars of coal over another railroad to points in Iowa. In a suit to have declared invalid an order of the Iowa commission, it was held that the shipments from Davenport to points in Iowa were intrastate. Justice Hughes, speaking for the United States Supreme Court in that case, said: "It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract. *Ohio Railroad Commission v. Worthington*, 225 U. S. 101 (56 L. Ed. 1004); *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111 (57 L. Ed. 442); *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336 (57 L. Ed. 1215, 46 L. R. A. [N. S.] 391n). But the fact that commodities received on interstate shipments are reshipped by the consignee, in the cars in which they

31. *Louisville & N. R. Co. v. Strange's Adm'x*, 155 Ky. 439, 6 N. C. C. A. 75n, 92n, 83n, 185n. *Accord*: *Pennsylvania R. Co. v. Knox*, 218 Fed. (C. C. A.) 748.





are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same state from having an independent and intrastate character. *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403 (51 L. Ed. 540); *Ohio Railroad Commission v. Worthington*, 225 U. S. 101, 109 (56 L. Ed. 1004); *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 129, 130 (57 L. Ed. 442). The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the commission must be taken as referring solely to intrastate transportation originating at Davenport.”<sup>32</sup>

**§ 69. When Reshipment from Point of Delivery Does Not Change Interstate Character of Traffic.—**

A shipper consigned a commodity from St. Louis, Missouri, to Leadville, Colorado. It was transported over one railroad from St. Louis to Pueblo, Colorado, the receiving carrier giving a receipt showing that the commodity was to be delivered to the consignee at Leadville via another railroad. No through bill of lading was issued and no through route had been established. The first company issued a bill of lading for the shipment from St. Louis to Pueblo at a local rate. The car was there delivered to another railroad company at a local rate which company named the first railroad company as consignor

<sup>32</sup>. *Chicago, M. & St. P. Ry. Co. v. Iowa*, 233 U. S. 334, 58 L. Ed. 988.

to the consignee. The freight was always collected either at point of origin or at destination and divided according to the local rates of each. It was held by the United States Supreme Court that while there was no through rate or through route, there was in fact a through shipment from St. Louis, Missouri, to Leadville, Colorado, and the interstate character of the shipment could not be destroyed by ignoring the point of origin and destination, separating the rate into its component parts and by charging local rates and issuing local way bills and thus attempting to convert an interstate shipment into an intrastate shipment. The court quoting from a former decision, said: "When goods shipped from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce."<sup>33</sup>

In another case shippers delivered to carrier at certain stations in the state of Louisiana eighteen carloads of logs and staves to be transported by railway from said stations to Alexandria, Louisiana, and there delivered to another railroad company which transported them to New Orleans, Louisiana, where they were unloaded from the cars, put on board ship and exported to foreign countries. The bills of lading in each instance provided for the delivery of the freight from the initial point to New

33. *Baer Bros. v. Denver & R. G. R. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055.





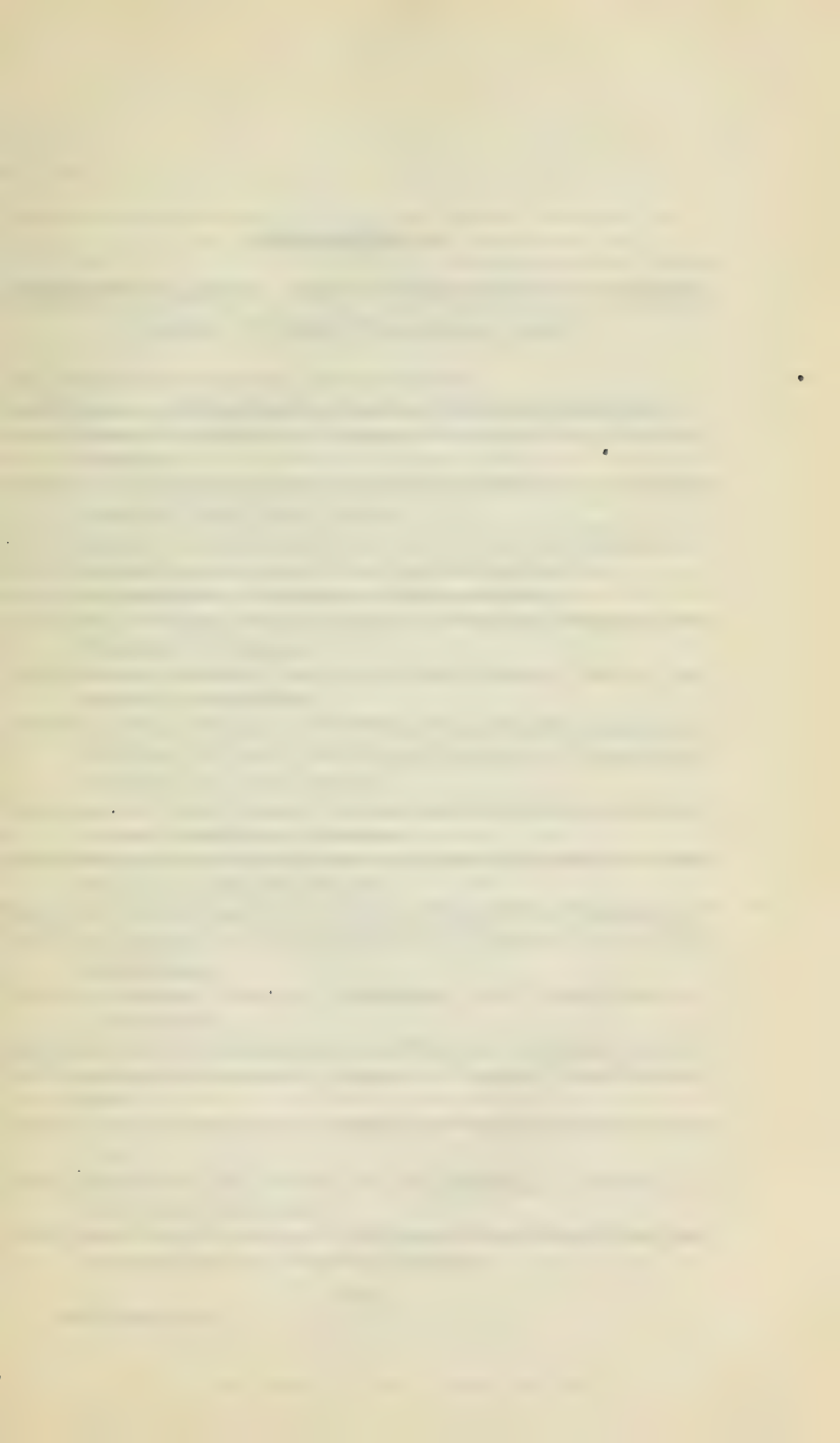


Orleans, there to be delivered to the shipper or consignee's order. The consignee resided at New Orleans, was a broker engaged in negotiating for foreign shipments and attending to shipments for consignors in the United States. But notwithstanding the bills of lading the staves and logs were intended by the shippers to be exported to foreign countries and were treated by both shippers and carriers accordingly, the shippers always holding the cars on the railroad track at New Orleans until they could accumulate cargo to fill their export orders and arrange for transportation. The railroad company allowed shippers twenty days' time for delivery, as in the case of all export shipments, without charging demurrage which the company would have had the right to charge after the expiration of four days if the shipments had been considered and treated as purely intrastate. The sole question before the United States Supreme Court was whether the shipments were foreign or intrastate commerce while moving through Louisiana. The court held that they were foreign shipments, and that the cargo took that character when it is actually started in the course of transportation to a foreign country, although it was transported within the state under local bills of lading. The staves and logs were intended by the shippers to be exported to foreign countries and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans.<sup>34</sup>

34. Railroad Commission of Louisiana v. Texas & P. R. Co., 229 U. S. 336, 57 L. Ed. 1215.

**§ 70. All Carriers by Railroad and All Their Employees Within Territories Included.**—As Congress has full and complete power over territories and other possessions of the United States, § 2 of the federal act, which applies to all common carriers by railroad and all their employees in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, is valid.<sup>35</sup> Although the Act of 1906 was declared invalid as to carriers engaged in interstate and foreign commerce, even that law as to *all* carriers and *all* their employees in territories and other possessions of the United States, was declared valid. However, by § 2, *supra*, of the Act of 1908 which regulates only carriers by *railroad* in territories and other possessions of the United States, the Act of 1906 was repealed. But it was specifically provided in § 8 of the Act of 1908 that “nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled ‘An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees,’ approved June eleventh, nineteen hundred and six.”

35. *El Paso v. N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106, *aff'g* 102 Tex. 378; *Atchison, T. & S. F. Ry. Co. v. Mills*, 49 Tex. Civ. App. 349.





## CHAPTER V

### BENEFICIARIES AND DAMAGES IN DEATH CASES UNDER FEDERAL ACT

- § 71. Beneficiaries Under the Federal Statute.
- § 72. Existence of Beneficiaries Named in Statute Jurisdictional.
- § 73. Parents Not Entitled to Damages When There Is a Widow or Children.
- § 74. No Remedy Under the Federal Act Unless There Are Dependent Relatives Named in the Statute.
- § 75. Measure of Damages in Cases of Death Under the Federal Act.
- § 76. Damages for the Estate of Decedent Not Recoverable.
- § 77. No Presumption of Damage to Widow and Child.
- § 78. Loss of Society, Companionship and Wounded Affections Not Elements of Damages.
- § 79. Statutory Action Is Not for the Equal Benefit of Each of the Surviving Beneficiaries.
- § 80. Cases Under Federal Act in Which Courts Decided Question of Sufficiency of Proof Establishing Dependency of Beneficiaries in Second and Third Classes.
- § 81. Loss of Care, Counsel, Training and Education by Minors Proper Elements of Damages.
- § 82. Pecuniary Loss Not Dependent Upon Any Legal Liability of the Employe to the Beneficiaries.
- § 83. Alien Parents Residing Abroad May Recover Under Federal Act.
- § 84. No Recovery for Pain and Suffering of Deceased Prior to 1910 Amendments.
- § 85. No Recovery Under § 9 (Amendment 1910) When Death Is Instantaneous.
- § 86. Decisions of National Courts on Measure of Damages Control.
- § 87. Errorless Instructions on Measure of Damages Under Federal Act.
- § 88. Erroneous Instructions on Measure of Damages Under Federal Act.
- § 89. Beneficiaries May Recover for the Suffering of Deceased as Well as for His Death.
- § 90. Death Must Be Result of Negligence Before Beneficiaries Can Recover Under § 1, But Not Under § 9.

- § 91. Loss of Prospective Gifts—Contributions During Lifetime of Deceased Employee.
- § 92. The Term ‘‘Next of Kin’’ Construed to Mean Illegitimate Children—Conflicting Decisions.
- § 93. Cases Declaring the True Measure of Damages and Approved by the United States Supreme Court.
- § 94. Distribution of Amount Recovered Controlled by Federal Statute and Not State Laws.
- § 95. Damages Due Each Beneficiary Must Be Apportioned in the Verdict.

**§ 71. Beneficiaries Under the Federal Statute.**—In cases of death of employes under conditions described in the act, the personal representative may bring an action, first, for the benefit of the widow, or husband or children of the employe. If there be no husband, widow or children, then the employe's parents become the beneficiaries under the federal act. If there be no husband, widow or children and no parents of the employe surviving him, then the action may be brought for the benefit of the next of kin dependent upon such employe.

**§ 72. Existence of Beneficiaries Named in Statute Jurisdictional.**—If an employe of a railroad suffers death while the carrier is engaged in interstate commerce, and while he is employed in such commerce, no right of action under any law exists against the carrier for negligence in causing such death, where none of the classes mentioned in the federal statute exists or survive the decedent. The right of action given under the federal law is conferred upon them and no one else. Hence the existence of such beneficiaries is jurisdictional to a right of action.<sup>1</sup> That

1. *Illinois C. Ry. Co. v. Doherty's Adm'r*, 153 Ky. 363, 6 N. C. C. A. 75n, 440n, 444n, 47 L. R. A. (N. S.) 31n; *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 766, 6 N. C. C. A. 439n, 446n.







no action exists for the death of an employe unless the beneficiaries named in the act survive and who suffer pecuniary loss, is affirmed in a recent case decided by the Supreme Court of the United States.<sup>2</sup> In that case the court said: "The nature of the rights and responsibilities arising out of this act has been discussed and determined in four opinions announced by this court since the instant cause was decided by the Circuit Court of Appeals. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. Rep. 192 (3 N. C. C. A. 807), *Ann. Cas.* 1914 C 176n; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. Rep. 224 (3 N. C. C. A. 809n, 831n); *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806 (4 N. C. C. A. 926n); *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305 (6 N. C. C. A. 194n), *Ann. Cas.* 1914 C 159. It is now definitely settled that the act declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury: (1) liability to the injured employe for which he alone can recover; and (2), in case of death, liability to his personal representative 'for the benefit of the surviving widow or husband and children,' and if none, then of the parents, which extends only the pecuniary loss and damage resulting to them by reason of the death."

**§ 73. Parents Not Entitled to Damages When There Is a Widow or Children.**—Under the federal

2. *Garrett v. Louisville & N. R. Co.*, — U. S. —, 35 Sup. Ct. 32,

act, the intestate's mother is not entitled to share in the damages when there is a widow.<sup>3</sup> This conclusion necessarily follows from a reading of the statute, because none of the beneficiaries in the second class, the parents, are entitled to any damages, no matter how dependent they were, if the decedent left surviving him dependent beneficiaries, named in the first class, that is, a widow or children. On the other hand, if there are no beneficiaries specified in the first class, the beneficiaries mentioned in the second class may then recover, if they prove a pecuniary loss by reason of the death of the deceased.

**§ 74. No Remedy Under the Federal Act Unless There Are Dependent Relatives Named in the Statute.**—If at the time of the death of an employe or an injury which subsequently caused death, the carrier was engaged in interstate commerce and the injured servant was employed by it in such commerce, there is no remedy against the carrier unless dependent beneficiaries named in the act, survive him. The question of survival of the cause of action, is not one of procedure governed by the state practice but depends upon the substance of the action.<sup>4</sup> Although the deceased left surviving him beneficiaries named in the statute, yet there is no liability when the federal act is applicable, unless the bene-

aff'g same case reported in 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, 4 N. C. C. A. 925n.

3. *Goen v. Baltimore & O. S. W. R. Co.*, 179 Ill. App. 566; *St. Louis, S. F. & T. Ry. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

4. *Michigan C. Ry. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n.





ficiaries were dependent upon the deceased. Unless the plaintiff shows that the beneficiaries named in the statute have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe, there can be no recovery. The damage is strictly limited to the financial loss thus sustained.<sup>5</sup>

In the McGinnis case, cited *supra*, the Supreme Court of the United States in overruling the decision of one of the courts of appeals in Texas, said: "The court of civil appeals upheld this ruling, saying that the federal 'statute expressly authorized a suit to be brought by the personal representatives for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.' 147 S. W. 1189. This construction of the character of the statutory liability imposed by the act of Congress was erroneous. In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a de-

5. *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 3 N. C. C. A. 809n, 831n; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n; *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 766, 6 N. C. C. A. 439n, 446n; *Illinois C. Ry. Co. v. Doherty's Adm'x*, 153 Ky. 363, 6 N. C. C. A. 75n, 440n, 444n, 47 L. R. A. (N. S.) 31n; *Chesapeake & O. Ry. Co. v. Dwyer's Adm'x*, 157 Ky. 590, 6 N. C. C. A. 449n; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n; *Dooley v. Seaboard A. L. Ry. Co.*, 163 N. C. 454, 6 N. C. C. A. 440n, 442n, 452n.



ceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery therefore, must be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss.”

**§ 75. Measure of Damages in Cases of Death Under the Federal Act.**—In a suit under the federal act the damages can only be compensatory, and the measure of them is what the beneficiaries named in the statute and no one else, or either of them, necessarily lose in or by the death of the deceased employe, and in measuring these damages, the jury are at liberty to take into consideration the age, health, and expectancy of life of the deceased, his earning capacity, his character, his mode of treatment to his family and the amount contributed out of his wages to them for their support, and calculate from these facts the amount the jury, as reasonable and practical men, believe the plaintiffs lose because of the death. If the deceased was guilty of contributory negligence, the damages should be diminished, but if the violation by defendant of a law of Congress requiring safety appliances, contributes to the death or was the proximate cause thereof, then the damages are not to be diminished because of any contributory negligence.<sup>6</sup>

**§ 76. Damages for the Estate of Decedent Not Recoverable.**—Under the federal act the estate of deceased employe is not entitled to any damages by

6. *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879; *McCullough v. Chicago, R. I. & P. R. Co.*, — Ia. —, 142 N. W. 67, 6 N. C.





reason of his death. A trial court instructed the jury in a suit under the federal act that they could award as damages such a sum of money as would reasonably compensate the estate of decedent for the destruction of his power to earn money, caused by his death. This charge was held by the appellate court to be erroneous, for the reason that, the national statute made no provision for damages to the estate of a decedent caused by his death, the damages being confined solely to the pecuniary loss of the beneficiaries caused by the death.<sup>7</sup> In another case for a similar reason an instruction was permitted the recovery of damages for the benefit of the widow and children but in case the net earnings of the deceased were in excess of the sum, that such damages could be recovered by the administrator for the estate, was held erroneous under the federal act.<sup>8</sup> A similar instruction was condemned in another case for the same reason.<sup>9</sup>

**§ 77. No Presumption of Damage to Widow and Child.**—The Supreme Court of Iowa held in an action under the federal act, that substantial damages in cases of the death of a husband and father, would be presumed in favor of the widow and children.<sup>10</sup>

C. A. 78n, 444n, 449n, 451n; *Thornton v. Seaboard A. L. Ry. Co.*, — S. C. —, 6 N. C. C. A. 85n, 93n, 82 S. E. 433.

7. *Chesapeake & O. R. Co. v. Dwyer's Adm'r*, 157 Ky. 590, 6 N. C. C. A. 449n.

8. *Southern Ry. Co. v. Hill*, 139 Ga. 549.

9. *Dooley v. Seaboard A. L. Ry. Co.*, 163 N. C. 454, 6 N. C. C. A. 440n, 442n, 452n.

10. *McCullough v. Chicago, R. I. & P. R. Co.*, — Iowa —, 6 N. C. C. A. 78n, 444n, 449n, 451n, 142 N. W. 67. See also, *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715.

The court cites authorities to sustain this proposition but this ruling seems to be in direct conflict with the decisions of the Supreme Court of the United States. It is held by that court, that, even as to beneficiaries in the first of the three specified classes under the federal act, proof of pecuniary loss must both be alleged and shown.<sup>11</sup>

**§ 78. Loss of Society, Companionship and Wounded Affections Not Elements of Damages.**—The pecuniary loss or damage which alone can be recovered under the federal act by the beneficiaries, excludes those losses which result from the deprivation of the society and companionship of the deceased, or those injuries to the affections and sentiments which arise from the death of relatives and which, though painful and grievous to be borne, cannot be measured or recompensed by money.<sup>12</sup> In the case last cited, it was held that the care and advice which the wife would have received from the husband if he had lived, was not an element of damage and threw the door open to the wildest speculation. In another case it was held that loss to parents of the companionship of their son was not an element of damages under the federal act.<sup>13</sup> The Supreme Court of North Carolina held that the damages recoverable by a parent for the negligent death of a

11. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n.

12. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n.

13. *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 3 N. C. C. A. 809n, 831n; *McCullough v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 6 N. C. C. A. 78n, 444n, 449n, 451n, 142 N. W. 67.







son was limited under the federal act to such loss as resulted to the parent because of being deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the employe.<sup>14</sup>

**§ 79. Statutory Action Is Not for the Equal Benefit of Each of the Surviving Beneficiaries.**—The action given to an administrator in case of the death of an employe under the federal act, is not given for the equal benefit of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss and that apportionment is for the jury to return. This principle will exclude any recovery in behalf of such as show no pecuniary loss. Where a deceased employe left a widow and four children, a suit was brought by the widow as administratrix for her benefit and all the children who were named in the petition. One of the children was a married woman residing with and being maintained by her husband. There was neither proof nor allegation that this married daughter was in any way dependent upon the deceased, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. It was held that the court committed error in refusing to instruct the jury that they could not find any damage in favor of the married daughter.<sup>15</sup>

14. *Dooley v. Seaboard A. L. Ry. Co.*, 163 N. C. 454, 6 N. C. C. A. 440n, 442n, 452n.

15. *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n; *Illinois C. Ry. Co. v. Doherty*, 153 Ky. 363, 6 N. C. C. A. 75n, 440n, 444n, 47 L. R. A.

**§ 80. Cases Under Federal Act in Which Courts Decided Question of Sufficiency of Proof to Establish Dependency of Beneficiaries in Second and Third Classes.**—Under the federal act the measure of damages to parents for the death of an unmarried adult son has been held to be the present worth of such

(N. S.) 31n; *McCullough v. Chicago, R. I. & P. R. Co.*, — Iowa —, 6 N. C. C. A. 78n, 444n, 449n, 451n, 142 N. W. 67.

In *McGarvey's Guardian v. McGarvey's Admr. et al.*, — Ky. —, 173 S. W. 765, decided March 2, 1915, an administrator of the estate of a deceased railroad employe had brought an action against a railroad company under the Federal Act and the cause was settled by the payment of the sum of \$5,000 to him. The beneficiaries were the widow and a child by a former marriage and the question was presented to the court how the money should be apportioned between them. The court held that the money should be divided on the basis of the respective periods during which the two beneficiaries would sustain pecuniary loss. The court said: "There yet remains the question of the extent to which he is entitled to participate therein. If we were making this finding as an original proposition (that is, as a jury), the result reached might be different; but here the amount of the recovery is already ascertained and fixed, and the only question involved is the proper division of the fund in an equitable way. The widow was about 30 years of age at the time of her husband's death, and in good health, but without means or income; and, comparing the condition and position of the two, we have reached the conclusion that the pecuniary loss to both son and widow is approximately the same upon a per annum basis. Considering the pecuniary loss to each to be the same sum per annum, the recovery should be divided on the basis of the respective periods during which the two beneficiaries will sustain pecuniary loss. Upon this question, counsel for appellant argues that the period of pecuniary loss to the son should embrace such time, beyond the date of his attaining the age of 21 years, as would reasonably be required to educate him for the medical profession, as there is some evidence in the record that his father had expressed a determination to give him such an education; counsel insisting that to do this would require six years, and that therefore such is the period of his pecuniary loss. Counsel for appellee insists that his pecuniary loss should not be extended beyond the date of his attaining the age of 21 years, and that the period of pecuniary loss to the widow should be her expectancy of life, according to the life tables, which is 30 years. We cannot, however, agree wholly with either contention. It may





gifts as they reasonably could have expected to receive from him in the course of their lives.<sup>16</sup> In the case cited an unmarried adult son, 25 years old,

be conceded that the expectations of the son may extend beyond the date of his attaining the age of 21 years, but his dependency would not, and, as that is the date of the termination of the legal liability of the father, it should, under ordinary circumstances, be the end of the period of pecuniary loss to him. The expectancy of life of the widow might be greater than that of the deceased husband, or it might be less, but her dependency for support could not extend longer than his expectancy of life, as the support must then cease. If her life expectancy is less than that of the husband, the period of pecuniary loss would be governed by her expectancy. If her life expectancy is greater than that of her husband, then her period of pecuniary loss should be governed by his expectancy of life. In this case, from the death of John McGarvey until the date upon which Henry McGarvey will have attained the age of 21 years is 4 years and 4 months; and McGarvey's expectancy of life was 27.34 years; that of his widow being greater. And, dividing the recovery on the basis of the respective periods of pecuniary loss, the widow is entitled to 86.32 per cent thereof, or \$4,316.00, and the son is entitled to 13.68 per cent thereof, or \$684."

16. *McCullough v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 6 N. C. C. A. 78n, 444n, 449n, 451n, 142 N. W. 67; *Richelieu v. Union Pac. Ry. Co.*, — Neb. —, 149 N. W. 772. Decedent was a laborer for an interstate railroad. He was 23 years of age. He had arrived in this country about two months before his death. Prior thereto he had lived with his parents in Finland. There was some evidence that he had given his parents some money. The court in holding that there was sufficient evidence of dependency to sustain a verdict of \$2,000, said: "But taking the evidence as it is found, may we say there is no support for the amount of the verdict? Under our decisions we think there is. The facts indicate that the parents were in need of financial assistance; that the deceased had during his minority and for two years in addition given aid both in money and its equivalent, work; and that he had the disposition to continue the same, since from his first wages in this country he sent his father \$10.00. It is also apparent that the deceased was industrious and was earning wages, at least those of the ordinary laborer. We think these are factors from which the jury could find that in the death of their son the parents sustained a substantial pecuniary loss." *Lundeen v. Great N. Ry. Co.*, — Minn. —, 150 N. W. 1088.

killed under conditions making the federal act exclusively applicable upon the question of recovery, made his home with his father and mother, boarded and roomed there and paid them for his room and board and in that way contributed to the family. The son was the oldest of the children. The father was a common laborer, 57 years old, and the mother 54 years old. The son had been working for the railroad two years. The mother, testifying said that the son contributed to the family expenses but whether by gifts or solely in paying for board and lodging as described, does not clearly appear in the report of the case. This was the entire testimony in the case as to the pecuniary loss. The court held that such evidence did not furnish sufficient data upon which a jury could properly award a verdict of \$5,000.

On the other hand, in another case, a son, single, 24 years old, strong in physique, well educated, possessing good business traits, living with his wealthy parents on a large farm, went away to become a brakeman, stating he would be back on the farm to gather the corn. He was killed while on duty by the negligence of the defendant. While at home and before going to work for the railroad, he raised crops on the farm and lived with his father and mother as one of the family. He did not receive any fixed wages from his father who owned and cultivated the farm. His father was in the habit of giving him money, however, when he desired. The father was 74 years old and growing feeble. He relied on the deceased as the manager of his farm.









It was held these facts presented a *prima facie* case showing a reasonable expectation of pecuniary benefits from the continuance of the son's life which with proof of the value of such benefit, was susceptible of estimate of the pecuniary loss to the father.<sup>17</sup>

That a deceased railroad employe had a sick brother to whom he had not contributed anything in his lifetime did not make the question of dependency under the federal statute a matter for the jury to pass upon for such evidence was not sufficient.<sup>18</sup> In another case the Supreme Court of North Carolina held that a mother may recover damages for the death of a son killed while employed in interstate commerce for a common carrier railroad if she has reasonable expectation of pecuniary benefit from the continuance of the life of the son although he had not contributed anything to her support in his lifetime.<sup>19</sup> A laboring man killed while repairing an interstate track for a railroad company, during his lifetime sent five or six dollars a week to a widowed sister in Italy who had two children. By his death the sister was deprived of this money which she had been accustomed to receive. It was held by a majority of the court, Judges Lyon and Smith dissenting, that such facts were sufficient to submit the question of dependency under the federal act to

17. *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, 4 N. C. C. A. 925n.

18. *Jones v. Charleston & W. C. Ry. Co.*, — S. C. —, 6 N. C. C. A. 439n, 443n, 82 S. E. 415.

19. *Irvin v. Southern Ry. Co.*, — N. C. —, 80 S. E. 78.

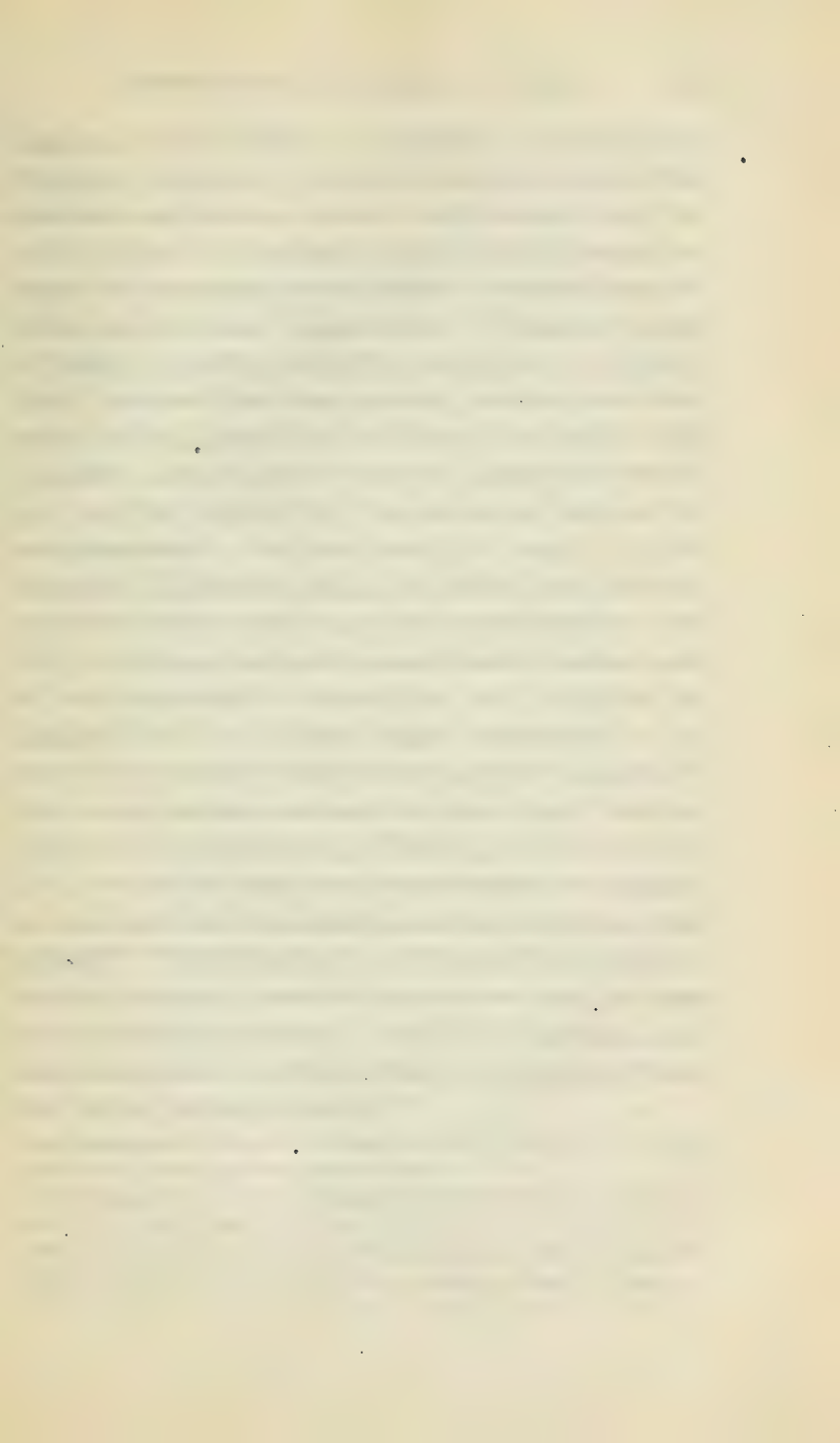
the jury.<sup>20</sup> In an action by an administrator of a railroad employe for the benefit of brothers and sisters of the deceased the evidence disclosed that the deceased left surviving him several brothers and two sisters, one a sister of charity residing in a convent who received no support from the decedent in his lifetime, and the other a married woman living in Ireland. There was some testimony that the decedent had borrowed money to send to his sister in Ireland, but whether the money was sent her in payment of a debt or for her support was not disclosed. No evidence was introduced to show that the husband in Ireland was unable to support his wife. There was no evidence that any of the brothers were dependent upon the deceased. The court held that there could be no recovery under the federal act.<sup>21</sup> A sister whom a deceased brakeman in his lifetime supported by gifts of money and by payment of board, was held to be a dependent beneficiary under the federal act.<sup>22</sup>

**§ 81. Loss of Care, Counsel, Training and Education by Minors Proper Elements of Damages.**—The term “dependency” as used in the federal act has been held by the Supreme Court of the United States to be jurisdictional to the right of recovery as to all three of the classes of beneficiaries mentioned in the statute. The term means a pecuniary or material loss, as distinguished from those moral elements of

20. *Bitondo v. New York, C. & H. R. Co.*, 163 App. Div. (N. Y.) 823, 6 N. C. C. A. 230n.

21. *Illinois C. R. Co. v. Doherty's Adm'r*, 153 Ky. 363, 6 N. C. C. A. 75n, 440n, 444n, 47 L. R. A. (N. S.) 131n.

22. *Richelieu v. Union P. Ry. Co.*, — Neb. —, 149 N. W. 772.





loss due to the death of a relative. Hence it was declared erroneous for a court to instruct a jury that the care and advice which a wife would have received from the husband were financial losses because such elements are not strictly financial losses.<sup>23</sup> However, the term "dependency" in cases of a loss of father or mother, when the beneficiary is a minor child, includes that care, counsel, training and education which, under the evidence, the child would probably have received from the parent and which can only be supplied by the service of another by compensation.<sup>24</sup> In one case the court, on the measure of damages under the federal act, told the jury that they might take into consideration "the care, attention, instruction and training which one of his (decedent's) disposition and character as disclosed by the evidence might reasonably be expected to give his children during their minority." The court further advised the jury that "neither sympathy, bereavement, affection, love nor devotion," could be considered as an element of damage. It was held that the charges as thus explained was proper.<sup>25</sup> The damages to an infant child under the national statute, it was held in another case, includes the reasonable pecuniary value of the nurture, care and admonition the child would have received from the father during minority.<sup>26</sup>

23. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n.

24. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n.

25. *St. Louis & S. F. R. Co. v. Duke*, 112 C. C. A. 564, 192 Fed. 306.

26. *St. Louis, S. F. & T. Ry. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

**§ 82. Pecuniary Loss Not Dependent Upon Any Legal Liability of the Employee to the Beneficiaries.**

—The act of Congress is for the benefit of certain specified relatives in that act mentioned and the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived.<sup>27</sup> In a case against a common carrier by railroad under the federal act, there was evidence that the deceased had abandoned his wife and child and had not lived with them or contributed to their support for many years. The trial court instructed the jury that it was the legal duty of the deceased in his lifetime to care for and support his wife and child even though he lived separate and apart from them and that the wife and child had the right to recover damages for his wrongful death independent of whether he had contributed anything to their support. The court held this instruction was wrong in that it fixed “legal duty” independent of pecuniary losses as a measure by which the jury should estimate the damages, instead of the pecuniary benefits which the wife and child might reasonably have received during his lifetime.<sup>28</sup>

27. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n.

28. *Fogerty v. Northern P. Ry. Co.*, — Wash. —, 133 Pac. 609.







**§ 83. Alien Parents Residing Abroad May Recover Under Federal Act.**—Whether alien parents of a person killed by the negligence of another can recover has been the subject of conflicting decisions by the courts of this country, some holding that alien parents are included as beneficiaries under suits giving actions for death and others holding that they are excluded.<sup>29</sup> A federal district court held that the Federal Employers' Liability Act did not authorize a recovery for the sole benefit of alien parents of an employe, who resided abroad.<sup>30</sup> But when this case reached the Supreme Court of the United States on writ of error, that court held that such parents could recover for the death of an employe in an action under the federal act.<sup>31</sup> In so holding, Mr. Justice Holmes, after referring to cases from other jurisdictions,<sup>32</sup> said: "We may refer to these cases for their reasoning without reproducing it, and need not do much more than add that the policy of the Em-

29. Some of the decisions affirming that alien beneficiaries can recover, are the following: *Mulhall v. Fallon*, 176 Mass. 266; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 193; *Szymanski v. Blumenthal*, 3 Pennw. (Del.) 558; *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534. Others denying the right of recovery are: *Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 59 Am. St. Rep. 676; *Maiorano v. Baltimore & O. R. Co.*, 216 Pa. 402, 21 L. R. A. (N. S.) 271; *McMillan v. Spider Lake Sawmill & Lumber Co.*, 115 Wis. 332, 60 L. R. A. 589, 95 Am. St. Rep. 947.

30. *McGovern v. Philadelphia & R. R. Co.*, 209 Fed. 975, 6 N. C. C. A. 441n.

31. *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, — L. Ed. —; *accord*, *Bombolis v. Minneapolis & St. L. R. Co.*, — Minn. —, 150 N. W. 385.

32. The cases referred to were the following: *Mulhall v. Fallon*, 176 Mass. 266, 54 L. R. A. 934, 79 Am. St. Rep. 309; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 217, 88 Am. St. Rep. 191; *Atchison, T. & S. F. R. Co. v. Fajardo*, 74 Kan. 314, 6 L. R. A. (N. S.) 681n.

ployers' Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies. Even if that were its only object, we might accept the distinction expressed in *Mulhall v. Fallon*, *supra*, between the duties imposed by a statute upon persons in another state and benefits conferred upon them. Extra territorial application would naturally not be given to the first, 'but rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered.' The rights and remedies of the statute are the means of executing its policy. If this 'puts burdens on our own citizens for the benefit of nonresident aliens,' as said by the district court, quoting the *Deni* case, *supra*, it is a burden imposed for wrongdoing that has caused the destruction of life. It is to the prevention of this that the statute is directed. It is for the protection of that life that compensation for its destruction is given and to those who have relation to it. These may be wife, children, or parents. The statute, indeed, distinguishes between them, but what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed.'"

**§ 84. No Recovery for Pain and Suffering of Deceased Prior to 1910 Amendments.**—Under the federal act, prior to the 1910 amendments, the benefi-





ciaries of a deceased employe could not recover for the injury and pain suffered by the deceased. The Arkansas Supreme Court sustained a verdict for separate sums on two counts, the first for pecuniary loss to the next of kin and the second for the injury and pain suffered by intestate. At the trial the defendant asked for a ruling that the plaintiff could not recover damages for pain under the second count. The state court held that the act of Congress was supplementary to the state law and that such a verdict could be upheld under the state law. On writ of error from the United States Supreme Court to the State Supreme Court, the national court held that the federal act was exclusive and superseded the state law as to all employes employed in interstate commerce and interstate carriers also engaged in such commerce, and since the only action given by the federal act was one for the benefit of the next of kin, the ruling of the state court was wrong. No attempt was made in that case to construe the effect of the 1910 amendment as the accident occurred in 1909.<sup>33</sup>

**§ 85. No Recovery Under § 9 (Amendment 1910) When Death is Instantaneous.**—Where the injury and death of an interstate employe are so simultaneous that it cannot be said that the employe endured pain and suffering, there can be no recovery under § 9 (Amendment 1910) of the federal act providing, that a right of action given to a person

33. *St. Louis I. M. & S. Ry. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031, reversing the same case in 98 Ark. 240; *Garrett v. Louisville & N. R. Co.*, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, 4 N. C. C. A. 925n, aff'd — U. S. —, 35 Sup. Ct. 32.



suffering injury shall survive to his personal representatives for the benefit of the beneficiaries named in § 1.<sup>34</sup> On the other hand, if the employe lives an appreciable length of time after receiving an injury, even though in a state of unconsciousness, his cause of action survives under § 9.<sup>35</sup> In the Shewalter case cited the Supreme Court of Tennessee, construing the federal act, after comparing it with the death statutes of several states, held that, if the death of an employe was instantaneous, the beneficiaries, through the personal representative, could recover any and all damages caused them by the death, but in order to permit a recovery for additional damages under the survival amendment, the decedent must have survived the action. In that case a father was seeking damages for the death of his son. The court instructed the jury they could allow a reasonable sum for the pain and suffering of the decedent. Since the evidence disclosed that the death was instantaneous, the court held that the instruction was erroneous for the reasons given. In the other case cited, *supra*, the Supreme Court of Minnesota reached the same conclusion but held that testimony showing that the decedent after the injury, moaned and breathed for ten minutes, justified the trial court in submitting the question of survival of his cause of action to the jury.<sup>36</sup>

34. *Carolina, C. & O. Ry. Co. v. Shewalter*, 128 Tenn. 363, 6 N. C. C. A. 445n. *Accord*: *Dictum in Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625.

35. *Capital Trust Co. v. Great Northern Ry. Co.*, — Minn. —, 149 N. W. 14.

36. See also *Dillon v. Great N. Ry. Co.*, 38 Mont. 485.





**§ 86. Decisions of National Courts on Measure of Damages Control.**—In actions under the Federal Employers' Liability Act, the measure of damages sanctioned and approved by the United States Supreme Court controls the action of all other courts under the act.<sup>37</sup>

**§ 87. Errorless Instructions on Measure of Damages Under Federal Act.**—In an action for damages by an administrator for the benefit of a mother of a deceased employe of a railroad company, the Supreme Court of North Carolina in a case cited in the notes,<sup>38</sup> approved the following instructions as being accurate, correct and clear under the federal act: "The measure of damages in this case is not the measure of damages obtaining under the state practice, to-wit, the pecuniary value of the life of the intestate, during its prospective continuance, but is the measure of damages as fixed by the Federal Employers' Liability Act and is brought for the benefit of some certain person, to-wit, in this case the mother by reason of the death of her son. It is purely and entirely a money or financial loss. How much money has the mother been deprived of by the death of her son, computing the same at its present worth or value? It is not a question of how much the son could have made for his own use had he lived out his

37. *Nashville, C. & St. L. Ry. v. Henry*, 158 Ky. 88, 4 N. C. C. A. 495n, 6 N. C. C. A. 99n, 106n; *Dooley v. Seaboard A. L. Ry. Co.*, 163 N. C. 454, 6 N. C. C. A. 440n, 442n, 452n; *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156. A state law limiting the liability of a railroad company in cases of death to \$10,000 does not apply in an action under the Federal Employers' Liability Act. *Devine v. Chicago, R. I. & P. R. Co.*, — Ill. —, 107 N. E. 595.

38. *Irvin v. Southern Ry. Co.*, — N. C. —, 80 S. E. 78.

allotted time, but the present value of the sum his mother might reasonably have expected to receive from his earnings during her life, for the limit of time within which she could expect to receive financial aid from her son is the time which she could reasonably be expected to live. You must not undertake to give the equivalent or the value of human life. You will allow nothing for the suffering or sorrow of either the deceased or his mother. You must not attempt to punish the railway company but endeavor to give a fair and reasonable pecuniary value for the continuation of the life of the deceased to his mother. Therefore you will consider what sum of money, paid at the present time, in a lump sum, would represent the fair value of what the mother had a reasonable right to expect, under all circumstances, to receive from the earnings of her son, had he lived until her death. As a basis on which to enable you to make your estimate, it is proper for you to consider the wages the son was receiving, the age and health of the son, the fact that the son might have married and thereby made it necessary to use all or a part of his earnings in the support of his own family; you will consider the habits, prospect in life, industry, and skill of the son, the business in which he was engaged, and its hazards as to life; you will consider how much of his earnings he spent on himself or otherwise, either for necessities or for other purposes, as distinguished from what he spent on or gave to his mother, if you find from the evidence that he contributed anything from his earnings to his mother, because the part of







his wages that he spent on himself or for other purposes than that contributed to his mother, or what in the future she might reasonably expect he could contribute, would be entirely eliminated from your calculations. There is another limitation upon the amount that you will allow as damages, that is this: You will allow only the present value of what you may find the mother has lost in money because of the death of her son, for she is getting now in a lump sum that which she would have received from time to time during a future period. By this you are not to understand that you are to ascertain the number of years that the contributions to the mother from her son would probably continue, and then multiply such number of years by the amount of such probable yearly contribution, but you are to give a sum of money that will represent the present value of such contributions. The evidence you have heard as to the probable duration of the life of the mother, based upon the mortality tables of the insurance companies, is not conclusive, upon the question of the duration of her life. Such tables are submitted to you, not to control you, but merely to guide you. They are based upon averages, and there is no certainty that any person will live the average duration of life. Now, if you answer the first issue 'yes,' to-wit, that the Southern Railway is chargeable with negligence, you should first consider the question of damages, without relation to the question of contributory negligence. If you find that the plaintiff's intestate was guilty of contributory negligence, it would then be your duty to reduce the amount of

damages in proportion thereto, since the act provides that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee. I instruct you that this provision means this: If you find that the negligence of the two is equal (that is, that the railway company was guilty of negligence and the plaintiff's intestate was guilty of equal negligence that contributed to the injury), you will reduce the damages one-half. If you find that the plaintiff's intestate was guilty of more negligence than the railway company, then the damages should be reduced more than one-half. If he was guilty of less negligence than the railway company, then the damages should not be reduced as much as one-half."

The Supreme Court of Oregon in another action under the federal act <sup>39</sup> specifically approved the following instructions as being a fair, clear and accurate declaration of the law in guiding the jury as to the effect of contributory negligence in mitigating the damages: "In this connection you have no doubt observed from the testimony, as well as from the pleadings, that the plaintiff's participation in the transaction complained of has been alleged to be negligent in character. Now the plaintiff's negligence, if you find he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that he did an act or number of acts which a prudent engineer would not have done, or if he failed to do an act or number of acts which an

39. *Pfeiffer v. Oregon, W. R. & Co.*, — Ore. —, 7 N. C. C. A. 685, 144 Pac. 762.





ordinarily prudent engineer would have done under all the existing circumstances, having in view the probable danger of his receiving the injury, then I charge you that he is, with respect thereto, guilty of negligence; and if his acts, if any you find, were the proximate cause of the injury, and if you further find that the acts, if any, of the defendant and its employes were not the proximate cause of the injury, then it will be your duty to find a verdict for the defendant. And in this connection if you believe from the evidence that the plaintiff's injury was caused partly by one or more of the negligent acts of the defendant, mentioned in the complaint, and one or more of the negligent acts of the plaintiff, as mentioned in the answer, then it will be your duty to compare the same in accordance with instructions which I shall give you. In order to make clear to you what is meant by the comparison of negligence, declared by the federal law to be the duty of the jury to make, let me say that your first inquiry should be: Was the defendant guilty of negligence? Your second inquiry should be: Was the plaintiff negligent? Your third inquiry should be: In what degree did these causal negligences contribute to the accident? And I say to you, as a matter of law, that you must determine what proportion. If the plaintiff's negligence contributed or caused, we will say, the accident to the extent of one-third of the entire negligence, then the plaintiff's damages would be reduced by one-third; if to the extent of one-half, then his damages would be reduced by one-half; if to the extent of two-thirds, then his damages would

be reduced by two-thirds and if his negligence was alone the cause of the accident, then of course that would wipe out the damages and your verdict would be in favor of the defendant.”<sup>40</sup>

**§ 88. Erroneous Instructions on Measure of Damages Under Federal Act.**—A trial court in an action for damages under the federal act charged the jury that “where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin.” Condemning this instruction as being improper and constituting reversible error, the United States Supreme Court, by Mr. Justice McReynolds, said: “It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed he reasonably might have expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed, but there was nothing—indeed there could be nothing—to show a hypothetical injury which might have befallen some identified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiary with those of supposed dependents; and we think the trial court plainly erred when

40. Instructions referring the jury to the pleadings have been held by some courts to be erroneous and this part of the instructions, in such jurisdictions, should be given to the jury in other instruction and not by referring them to the pleadings.







it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation and rather invited the consideration of elements wholly irrelevant to the true problem presented and to indulge in conjecture instead of weighing established facts. The facts brought out during the course of the trial were adequate to constitute a strong appeal to the sympathy engendered in the minds of the jurors by the misfortune of a widow and her dependent children. In such circumstances it was especially important that the charge should be free from anything which they might construe as a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion or prejudice or from any other violation of lawful rights."<sup>41</sup> In another action under the federal act where there was evidence tending to show that the deceased employe was guilty of contributory negligence, the court instructed the jury that if they found the defendant guilty of negligence, then in assessing damages they had a right to take into consideration all of the testimony offered upon that question and allow such damages as they might deem fair and just compensation with reference to the pecuniary injury resulting

41. *Norfolk & W. R. Co. v. Holbrook*, — U. S. —, 35 Sup. Ct. 143, reversing same case reported in (C. C. A.), 215 Fed. 687.

from the plaintiff's intestate to his widow, and that, in estimating the damages, they had a right to take into consideration whatever they might believe from the evidence the widow might have reasonably expected in a pecuniary way from the continued life of the intestate. Condemning this instruction as being erroneous under the federal act, one of the Illinois Appellate Courts said: "This instruction wholly ignored the question of contributory negligence and the duty of the jury to consider, under the statute above referred to, a diminution of damages, and the giving of the same was for that reason a reversible error."<sup>42</sup> In an action by an administrator for the benefit of a wife and two infant children under the federal act, the jury was instructed on the measure of damages that they might consider the fact that the widow was deprived of her husband's companionship and association, and the loss of home ties in a way to indicate that such matters constitute a pecuniary loss. The court further told the jury that the law attempted to be liberal with the victims of such an accident. The instruction was condemned because it did not attempt to direct the jury to distinguish between support and companionship.<sup>43</sup> A charge to a jury in an action under the federal act stating that the law had no fixed standard by which to ascertain the loss and that the sole question for the jury to determine was what loss the wife and child suffered, was declared to be erroneous for the reason, that the law

42. *Hall v. Vandalia R. Co.*, 116 Ill. App. 12.

43. *New York C. & St. L. R. Co. v. Niebel* (C. C. A.), 214 Fed. 952.





has fixed a standard of damages and that standard or measure is the financial benefit which might reasonably have been expected if the deceased employe had not been killed through the negligence of the defendant.<sup>44</sup> A trial court, in an action under the federal act, instructed the jury as follows: "The measure of damages for loss of life of plaintiff's intestate is the present value of his net income and this is to be ascertained by deducting his net gross income and then estimating the present value of the accumulation from such net income, based upon this expectation of life." Condemning this instruction as being erroneous under the federal act, the Supreme Court of North Carolina said: "The rule for the assessment of damages laid down by his honor, while following the decisions of this court in the construction of Lord Campbell's Act, is erroneous as applied to the Federal Employers' Liability Act as construed by the Supreme Court of the United States. In *American R. R. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, (3 N. C. C. A. 809n, 831n), that court says: 'The cause of action which was created in behalf of the injured employe would not survive his death, nor pass to his representatives. But the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary

44. *Fogerty v. Northern Pac. Ry. Co.*, — Wash. —, 133 Pac. 609.



profits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained.' This language was quoted with approval in *Railroad v. McGinnis*, 228 U. S. 175, 33 Sup. Ct. 427, 57 L. Ed. 785, and the court adds in the last case: 'In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensate those relatives for whose benefit the administrator sues, as are shown to have sustained some pecuniary loss.' '' 45

**§ 89. Beneficiaries May Recover for the Suffering of Deceased as Well as for His Death.**—Since the amendment of 1910, which provides that a cause of action accruing to the injured employe survives for the benefit of the beneficiaries named in the statute, if the employe is injured and subsequently dies, it has been held by a Federal Circuit Court of Appeals that the beneficiaries may not only recover their damages for the death, but in the same action a recovery may be had in addition thereto for the damages, due to the injury, incurred by the decedent himself in his lifetime. A railroad employe was injured in August, 1910, by reason of the negligence of the railroad company. He brought suit for the injuries under the federal act and died shortly after

45. *Dooley v. Seaboard A. L. Ry. Co.*, 163 N. C. 454, 6 N. C. C. A. 440n, 442n, 452n.







the commencement of the action. The suit was revived in the name of the personal representative and damages were alleged to the deceased by reason of the injury and also damages by reason of the death to the widow and children. A recovery for one sum was had for damages to the deceased in his lifetime and for another sum for the damages to his widow and child by reason of his death, both being included in the same verdict. The point was made that such double damages could not be recovered, but the court held that the recovery was proper. As this is one of the first cases in which this amendment of 1910 was construed, we quote the court's language in full: "The question remains whether there is substantial basis for the contention of the plaintiff in error to the effect that recovery cannot be had in the same action both for the injury sustained by the deceased and for his death, even where, as here, the action is brought by the representative of the deceased for the benefit of all of the beneficiaries. But for the amendment of the act of April 22, 1908, the position would be well taken, for that act contained no provision for the survival of the cause of action thereby given to the injured employe for personal damages sustained by him. But on the 5th day of April, 1910, Congress amended the act of April 22, 1908, by changing § 6 thereof, and by adding the following section as § 9: 'Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and if none,

then of such employe's parents, but in such cases there shall be only one recovery for the same injury.' Act April 5, 1910, c. 143, 36 Stat. 291 (Fed. Stat. Am. 1912, Supp. p. 335). It thus appears that Congress by the amendment of 1910 provided for the survival of the cause of action given by the act of April 22, 1908, to the employe for his personal injuries, and conferred that cause of action, not upon the estate of the injured employe in the event of his death, but, first, upon the surviving widow or husband and children of such employe, with the further provision that 'in such cases there shall be only one recovery for the same injury.' We are of the opinion that the plain meaning of these statutory provisions is that, where one receives an injury in the employment of a railroad company under such circumstances as entitles him or her, as the case may be, by virtue of the statute, to recover from the company damages therefor, and that such injury results in the death of the injured person, damages resulting from the personal suffering, and from such death, not only may be recovered by the personal representative of the deceased in one action, but must be recovered in one action only, if at all, for the benefit of those specified in the statute. It results that the judgment in the present case must be, and is, affirmed." <sup>46</sup>

**§ 90. Death Must be Result of Negligence Before Beneficiaries Can Recover Under § 1, but Not Under § 9.**—Under the first section of the Act of 1908, it is provided that the beneficiaries can recover "for such

46. Northern P. Ry. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1.





death \* \* \* resulting from negligence'' so that the death must be proven to have resulted from the negligence. If an employe is injured while engaged in interstate commerce and thereafter dies from other causes, it is quite clear from the language of the statute that the beneficiaries cannot recover damages under the first section. But they may, however, through the personal representative, recover damages under § 9 which would include the damages recoverable by the deceased in his lifetime. Section 9 does not require that the death, upon which the cause of action survives, result from the negligent act. The disputed proposition among commentators whether the beneficiaries could recover under both §§ 1 and 9, in view of the clause in the statute "there shall be only one recovery for the same injury" has been decided in the affirmative.<sup>47</sup>

**§ 91. Loss of Prospective Gifts—Contributions During Lifetime of Deceased Employe.**—The Supreme Court of the United States, in the leading case which discusses the measure of damages under the Federal Employers' Liability Act, declared that the statute on this question was essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as the Lord Campbell Act.<sup>48</sup> Under such statutes questions have frequently arisen as to whether parents, for instance,

47. Northern P. Ry. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; St. Louis & S. F. R. Co. v. Conarty, 106 Ark. 421, 6 N. C. C. A. 202n, 447n.

48. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n.



in cases of the death of adult children, or adult children in the cases of death of a parent or the next of kin mentioned in the third class of the federal act, may recover for the loss of prospective gifts. Some courts have held it necessary for the plaintiff to show that the deceased, during his life gave assistance to the beneficiaries by way of money, services or other material benefits, which, in reasonable probability, would have continued but for the death.<sup>49</sup> Other courts have sustained a finding that there was reasonable expectation of the pecuniary benefit, although the evidence fell short of showing that assistance was actually rendered before the death.<sup>50</sup>

The Supreme Court of North Carolina passed on

49. *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233; *Fordyse v. McCants*, 51 Ark. 509, 4 L. R. A. 296, 14 Am. St. Rep. 69; *Atchison T. & S. F. R. Co. v. Brown*, 26 Kan. 443; *Cherokee & P. Coal & Mining Co. v. Limb*, 47 Kan. 469; *Richmond v. Chicago & W. M. Ry. Co.*, 87 Mich. 374; *Houston & T. C. Ry. Co. v. Cowser*, 57 Tex. 293; *Lehigh Iron Co. v. Rupp*, 100 Pa. 95; *Standard Light & Power Co. v. Muncey*, 33 Tex. Civ. App. 416; *St. Louis M. & S. E. R. Co. v. Garner*, 76 Ark. 555; *Colorado C. & I. Co. v. Lamb*, 6 Colo. App. 255; *Louisville N. A. & C. Ry. Co. v. Wright*, 134 Ind. 509; *Diebold v. Sharpe*, 19 Ind. App. 474; *McKay v. New England Dredging Co.*, 92 Me. 454; *Greenwood v. King*, 82 Neb. 17; *Holmes v. Pennsylvania R. Co.*, 220 Pa. 189, 123 Am. St. Rep. 685; *St. Louis S. W. Ry. Co. v. Huey*, — Tex. Civ. App. —, 130 S. W. 1017; *Fritz v. Western U. T. Co.*, 25 Utah 263; *Schnatz v. Philadelphia & R. R. Co.*, 160 Pa. 602; *San Antonio & A. P. Ry. Co. v. Long*, 87 Tex. 148, 24 L. R. A. 637; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95; *Rhoads v. Chicago & A. Ry. Co.*, 227 Ill. 328, 11 L. R. A. (N. S.) 623, 10 Ann. Cas. 111; *Wabash R. Co. v. Cregan*, 23 Ind. App. 1; *Chicago & A. Ry. Co. v. Shannon*, 43 Ill. 338.

50. *Seiben v. Great N. Ry. Co.*, 76 Minn. 269; *Hopper v. Denver & R. G. R. Co.*, 84 C. C. A. 21, 155 Fed. 273, 6 N. C. C. A. 442n; *Pierce v. Conners*, 20 Colo. 178, 47 Am. St. Rep. 279; *Gibson, etc., Co. v. Sharpe*, 50 Colo. 321; *Swift & Co. v. Johnson*, 71 C. C. A. 619, 138 Fed. 867, 1 L. R. A. (N. S.) 1161n.





this question under the Federal Employers' Liability Act and held that the father of a brakeman 23 years of age, unmarried, strong, healthy, of good habits was entitled to damages although the proof did not show that the son had contributed anything to his support since reaching his majority.<sup>51</sup> In that case, the evidence disclosed that the father was employed by another company and earning good wages; that at the time of the son's death he was not dependent upon the son; but testified that he might be in a few years if the son had lived. The son began to work for himself when he was 21 years old, and had given his father money prior to reaching his majority but not since. The son came home about every six weeks. There was no evidence that he had given his father any pecuniary assistance since reaching his majority. The court held that these facts sustained a finding that the father had a reasonable expectation of pecuniary benefit from the continuance of the life of the son, and that a motion for a judgment of nonsuit was properly denied.<sup>52</sup>

51. *Dooley v. Seaboard A. L. Ry. Co.*, 163 N. C. 454, 6 N. C. C. A. 440n, 442n, 452n.

52. The court based its decision upon the following cases: *Franklin v. S. E. R. Co.*, 4 Hurl. & N. (Eng.) 511; *Dollon v. S. E. Ry. Co.*, 4 C. B. N. S. (Eng.) 303; *Taff Ry. Co. v. Jenkins*, A. C. Eng. Cas., construing the Lord Campbell Act; and *Hopper v. Denver & R. G. R. Co.*, 84 C. C. A. 21, 155 Fed. 273, 6 N. C. C. A. 442n. The cases of *Michigan C. R. Co. v. Vreeland*, 227 U. S. 509, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 3 N. C. C. A. 809n, 831n; *Gulf, C. & St. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n were also cited and quoted from in the same opinion.

**§ 92. The Term "Next of Kin" Construed to Mean Illegitimate Children—Conflicting Decisions.**—The Supreme Court of North Carolina in a majority opinion, Judge Brown and Hoke dissenting, held that the term "next of kin" in the first section of the Federal Employers' Liability Act included an illegitimate child and that a suit could be maintained by an administrator for the death of an illegitimate son whose mother was dead for the benefit of the mother's legitimate children who were dependent upon the deceased employee.<sup>53</sup> In the majority opinion the court conceded that the general rule was to the contrary, but that in view of a statute of the state of North Carolina, which declares that illegitimate children of a mother shall be considered legitimate as between themselves and that their estates shall descend and be distributed as if they had been born in lawful wedlock and that in the event of the death of any such child, without children, his estate shall be distributed among his mother and such other persons as would be next of kin as if all the children had been born in lawful wedlock, an action for damages under the federal act was maintainable. Judge Brown in the dissenting opinion held that the majority opinion was in conflict with a prior decision of the Supreme Court of the United States, in which it was held that nothing in the state statute for the distribution of personal property can affect the right of the childless widow of an interstate railway employee, who was fatally injured, to the entire net proceeds of a judgment for

53. *Kenney v. Seaboard A. L. Ry. Co.*, — N. C. —, 82 S. E. 968.







the resultant damages, although under the state law the parents would have shared in the distribution.<sup>54</sup> It was also contended in the dissenting opinion that in the construction of the laws of Congress, the rules of the common law furnished the true guide, and that since under the common law the beneficiaries could not be termed to be "next of kin," the statute of North Carolina could not affect a recovery under the federal act.<sup>55</sup> The Kentucky Court of Appeals, in a suit under the federal act, reached a different conclusion from the majority opinion in the Kenney case. It was held by that court, that the deceased railroad employe, who was an unmarried man born out of wedlock, had no next of kin and that his father's widow and children, although dependent upon him as that term is construed under the federal act, were not beneficiaries under the statute.<sup>56</sup>

**§ 93. Cases Declaring the True Measure of Damages and Approved by the United States Supreme Court.**—In *Michigan Central R. Co. v. Vreeland*,<sup>57</sup> which is the leading case upon the question of the measure of damages in cases of death under the Federal Employers' Liability Act, the Supreme Court of the United States laid down some general rules as to the measure of damages and cited with

54. *Taylor v. Taylor*, 232 U. S. 363, 58 L. Ed. 638, 6 N. C. C. A. 436.

55. To sustain this proposition the following cases were cited: *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663; *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 47 L. Ed. 765.

56. *Cincinnati, N. O. & T. P. Ry. Co. v. Wilson's Adm'r*, 157 Ky. 460.

57. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n.

approval cases from various courts in which it was held that the rules were properly announced by the courts in those cases.<sup>58</sup> In view of the conflicting rulings of the courts of the several states as to the measure of damages under death statutes, due no doubt to the different language of the statutes of the several states, and in view of the further fact that such statutes do not apply and are superseded by the federal act as to interstate employes, these cases approvingly cited by the United States Supreme Court on this question, are of value to the practitioner and the courts in ascertaining the proper rules and standards in determining the measure of damages to the various beneficiaries named in the federal act.

In *Davis v. Guarnieri*, cited in the notes, the court instructed the jury as follows: "In this case the plaintiff's damages, if any, should be a fair and just compensation for the pecuniary injury resulting to the husband and children from the death of Angela Guarnieri. In no case can the jury, in estimating the damages, consider the bereavement, mental anguish or pain suffered by the living for the dead.

58. *Blake v. Midland Ry. Co.*, 18 Q. B. (Eng.) 93, 109; *Seward v. Vera Cruize*, 10 App. Cas. 59; *Illinois C. R. Co. v. Barron*, 5 Wall (U. S.) 90, 105, 106, 18 L. Ed. 591; *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 564; *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539, 545, 3 N. C. C. A. 778; *Monroe v. Pacific Dredging Co.*, 84 Cal. 515, 18 Am. St. Rep. 248; *Tilley v. Hudson R. R. Co.*, 24 N. Y. 471, 29 N. Y. 252; *Schaub v. Hannibal St. J. Ry. Co.*, 106 Mo. 74; *Atchison, T. & S. F. Ry. Co. v. Wilson*, 1 C. C. A. 25, 48 Fed. 57; *Lett v. Railway*, 11 Ont. App. (Can.) 1; *Pennsylvania R. Co. v. Goodman*, 62 Pa. 329, 339; *Louisville N. A. & C. Ry. Co. v. Rush*, 127 Ind. 545.





The damages are exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased, had she lived, is a proper subject for the consideration of the jury, if they find for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of this woman in a pecuniary point of view, is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money, for the loss of the services of this woman, that you are to find, if you find a loss. It is that sum which in money is a compensation for what you find this woman would reasonably have saved for her family. Of course, in determining this, these things are all to be considered; that is, the age, health, probability of length of life, or death, if she had not died from taking this drug." The court held that this instruction was not open to the objection of counsel that the term "services of the family" included not only benefits financially, but also the companionship to the husband and children, instruction by way of culture, moral training and other elements of like character, which are not within the rule of pecuniary compensation. The court held that the instruction gave a sound, clear and concise statement of the true rule of damages applicable to the case.

In *Munro v. Pacific Coast Dredging Company*, cited, *supra*, with approval by the Supreme Court of the United States, the court gave to the jury the

following two instructions: "No. 3. If your verdict shall be for the plaintiff, such damages may be given by you as, under all the circumstances of the case, may be just. And in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death, if you find that his mother is living. And the loss which the plaintiff is, in such a case as this, entitled to recover, is what the deceased would have probably earned and accumulated by his labor in his business or calling during the residue of his life, and which would have gone to the benefit of his mother, or heirs, or personal representative, taking into consideration his age, health, habits of industry, ability and disability to labor, and the probability of his length of life. No. 4. I further instruct you if, from the evidence, you should find for the plaintiff, then the measure of damages is not alone the pecuniary loss and injury sustained by the mother in the loss of her son, as just complained, but in assessing the damages given, you may, in addition, take into consideration the sorrow, grief and mental suffering occasioned by his death, to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support and protection of the deceased by reason of his death." The court in that case, after reviewing the English cases under the Lord Campbell Act, held that in a suit by a parent for the death of a child, recovery can only be had for the pecuniary loss which the mother might have sus-







tained, and that Instruction No. 4 was erroneous and should not have been given.

In *Louisville, N. A. & Corydon Railroad Company v. Rush*, 127 Ind. 545, also cited with approval in the *Vreeland* case, the court gave to the jury this instruction in a case where the father was suing for the death of a seven-year old child: "In any form of verdict you may adopt, you are required to state in writing such sum of money as you assess the plaintiff's damages at, in the event that he may, under the law, be entitled to recover under the facts as found by you. I, therefore, instruct you that in estimating and considering the amount of his damages you can only take into consideration the pecuniary injury, if any, that the plaintiff has sustained by the loss of services of the deceased from the time of her death until she would have reached the age of twenty-one years if she had lived. In other words, the proper measure of damages is the pecuniary value of the child's services from the time of her death until she would have attained her majority, in connection with her prospects in life, less her support and maintenance. You are not at liberty to consider the fact, if it be a fact, that the plaintiff has been deprived of the happiness, comfort and society of his daughter, nor can you consider any physical or mental suffering or pain, which may have been incurred by the plaintiff, or his family, by the deceased child, by reason of the injuries described in the complaint. You are simply to estimate the value of the child's services to the plaintiff from the time of her death until she would have

attained her majority, less the cost of her support and maintenance, including clothing, boarding, schooling and medical attendance." It was held by the court that in view of the instructions just quoted, that the following instruction was not erroneous, for the reason that the condition of the family should be taken into account in determining the amount of damages: "In estimating the plaintiff's damages, the jury may consider all his family at the time of the alleged accident, and take into account all the services that this child, alleged to have been killed, might reasonably have performed in his family until she attained her majority, and such services may include actual labor in helping to carry on the household affairs, and the pecuniary value of all the acts of kindness and attention which might reasonably be anticipated that she would have performed for the plaintiff and his family, until her majority, and would administer to their comfort as well as to their necessities. But the jury should not consider acts of affection, simply, and loss of companionship. The recovery is limited by the law to the actual pecuniary loss."

In *Tilley v. Hudson River Railroad Co.*, 24 N. Y. 471, 29 N. Y. 252, another case cited with approval in the *Vreeland* case, it was held that in an action by a father, as administrator of his wife, who was killed by negligence, leaving children, the value of her earnings, and the probability that the children would have received an estate, increased by such earnings on the death and intestacy of their father, cannot be considered in estimating the damages. But





the court placed this rule on the ground that under the common law, which was then in effect, the husband would inherit the property of the wife and that, therefore, any prospective inheritance to the children was too remote. It was held, however, that injury to the children in the loss of maternal nurture and education was a pecuniary one within the intent of the statute and a proper ground of damages. Defining the word "pecuniary" in such cases, the court said: "The injury to the children of the deceased by the death of the mother was a legitimate ground of damages; and we do not agree with defendant's counsel that they ought to have been nominal. The difficulty upon this point arises from the employment of the word 'pecuniary' in the statute; but it was not used in a sense so limited as to confine it to the immediate loss of money or property. For if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which had been cut off by the premature death of the person from which they would have proceeded, and the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives and which, though most painful and grievous to be borne, cannot be measured or reimbursed by money. It includes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But even children sustain a loss from

the death of a parent, and especially of a mother, of a different kind. She owes them the duty of nurture and of educational, moral and physical training, and of such instructions as can only proceed from a mother. That is, to say the least, as essential to their future well-being in a worldly point of view and to their success in life as the instruction in letters and other branches of elementary education which they receive at hands of other teachers who are employed for pecuniary compensation. \* \* \* The injury in these cases is not pecuniary in the very strict sense of the word, but it belongs to that class of wrongs, as distinguished from injuries, to the feelings and sentiments; and in my view, therefore, it falls within the term as used in the statute. \* \* \* The children have been deprived of that which they were entitled to receive by the wrongful act of the defendant.”

**§ 94. Distribution of Amount Recovered Controlled by Federal Statute and Not State Laws.**—In the distribution of any money received by an administrator of a deceased employe of a common carrier by railroad killed within the terms and conditions of the federal act, the state statute of descent and distribution does not control, but the money must be paid to the beneficiaries named in the federal statute, no matter whether a recovery is had either under § 1 of the federal act or § 9.<sup>59</sup> In the Taylor case an administrator of the estate of a railroad employe brought suit under the Federal Employers’ Liability Act and by consent of a court having juris-

59. Taylor v. Taylor, 232 U. S. 363, 58 L. Ed. 638.







diction over the estates of deceased persons, the administrator compromised with the railroad company and accepted a judgment of \$5,000. Under the law of the state one-half of this amount would have gone to the father and one-half to the widow of the decedent. The appellate division of the Supreme Court of New York held that the father was entitled to half of the money and the decision was affirmed by the court of appeals. But when the case reached the Supreme Court of the United States on writ of error, that court held that state laws were entirely superseded as to such a fund and that the widow was entitled to the whole sum.

**§ 95. Damages Due Each Beneficiary Must be Apportioned in the Verdict.**—In all actions under the Federal Employers' Liability Act where there are several beneficiaries, the damages due each of them must be separately stated in the verdict, the apportionment being for the jury to return.<sup>60</sup>

60. *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n, *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156; *Southern Ry. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360; *Collins v. Pennsylvania R. Co.*, 148 N. Y. Supp. 777; *Fogarty v. Northern P. Ry. Co.*, — Wash. —, 133 Pac. 609.

## CHAPTER VI

### ASSUMPTION OF RISK UNDER FEDERAL ACT

- § 96. The Statutory Provision.
- § 97. Assumption of Risk a Defense Under the Federal Act.
- § 98. Doctrine Applied as Defined in Decisions of National Courts.
- § 99. Concrete Instructions Must Be Given, if Requested.
- § 100. When Assumption of Risk Is Not a Defense—Federal Safety Appliance Act.
- § 101. When Assumption of Risk Is No Defense When There Is a Plurality of Causes.
- § 102. Violations of Rules Not Assumption of Risk.
- § 103. Distinction Between Assumption of Risk and Contributory Negligence.
- § 104. Cases in Which Interstate Employees Were Held Not to Have Assumed the Risk.
- § 105. Cases in Which Interstate Employees Were Held to Have Assumed the Risk.
- § 106. Defense of Assumption of Risk Must Be Pleaded to Be Available.
- § 107. Confusing Assumption of Risk with Contributory Negligence in Jury Instructions Under Federal Act.
- § 108. Assumption of Risk Eliminated in Actions for Violation of Hours of Service Act.

**§ 96. The Statutory Provision.**—Section 4 of the federal act provides “that in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.”





§ 97. **Assumption of Risk a Defense Under the Federal Act.**—After the passage of the act of 1908, several courts held that assumption of risk was not a defense to an action under the federal act.<sup>1</sup> These courts decided, that, if the plaintiff's injuries were due to any act of negligence enumerated in the first section of the act, that the result of such negligence could not be assumed by the employe even though he knew the risks and dangers arising therefrom. The decisions of these courts is illustrated by an opinion of Judge McCall in *Wright v. Yazoo & M. V. R. Co.*, cited in the notes, in which he said: "Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents or employes, upon the ground that the servant assumed the risk incident to the negligence of the officers, agents or employes of the carrier. \* \* \* As I construe the act, the risk that the employe now assumes is the ordinary dangers incident to his employment, which does not include, since the passage of this act, the assumption of the risk incident to the negligence of the carrier's officers, agents or employes, or any defect or insufficiency due to its negligence, in its cars, engines, appliances, ma-

1. *Wright v. Yazoo & M. V. Ry. Co.*, 197 Fed. 94; *Philadelphia, & W. R. Co. v. Tucker*, 35 App. Cas. (D. C.) 123, 1 N. C. C. A. 841n; *Southern Ry. Co. v. Howerton*, — Ind. —, 101 N. E. 121; *Sandidge v. Atchison, T. & S. F. R. Co.* (C. C. A.), 193 Fed. 867; *Malloy v. Northern P. R. Co.*, 151 Fed. 1019, 1 N. C. C. A. 862n; *Bower v. Chicago & N. W. R. Co.*, — Neb. —, 6 N. C. C. A. 213n, 148 N. W. 145.



chinery, track, roadbed, works, boats, wharves, or other equipment.”

But these decisions, and others of like import, have, no doubt, been in effect, overruled by subsequent decisions of the Supreme Court of the United States.<sup>2</sup> In the Horton case cited, the Supreme Court held that except as to violations of federal statutes enacted for the safety of employes, the defense of assumption of risk shall have its former effect as a complete bar to an action under the statutes. The court in that case said: “It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action.” An instruction given by the trial court in that case pursuant to a statute of the state so providing that a railroad employe did not assume any defective appliance furnished by the employer, was held erroneous and not

2. Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n, reversing the same case reported in 162 N. C. 424; *accord*, Central V. R. Co. v. Bethune, 124 C. C. A. 528, 206 Fed. 868; Guana v. Southern P. Ry. Co., — Ariz. —, 6 N. C. C. A. 96n, 139 Pac. 782; Fort Worth D. C. Ry. Co. v. Copeland, — Tex. Civ. App. —, 6 N. C. C. A. 93n, 164 S. W. 857; Missouri K. & T. Ry. Co. v. Scott, — Tex. Civ. App. —, 160 S. W. 432; Oberlin v. Oregon W. R. & N. Co., — Ore. —, 6 N. C. C. A. 75n, 79n, 95n, 188n, 142 Pac. 554; Barker v. Kansas City, M. & O. R. Co., 88 Kan. 767, 43 L. R. A. (N. S.) 112; Truesdell v. Chesapeake & O. Ry. Co., 159 Ky. 718; Farley v. N. Y., N. H. & H. R. Co., 87 Conn. 328, 6 N. C. C. A. 444n, 445n, 448n, 452n; Chesapeake & O. R. Co. v. Walker’s Adm’r, 159 Ky. 237; Glenn v. Cincinnati, N. O. & T. P. Ry. Co., 157 Ky. 453; Helm v. Cincinnati, N. O. & T. P. Ry. Co., 156 Ky. 240, 6 N. C. C. A. 83n, 84n.





a proper application of the rule under the federal act. The court held that under the common law doctrine of assumption of risk, the employe assumed defects due to the master's negligence when those defects and risks arising therefrom were known to him or were open and obvious or plainly observable.

**§ 98. Doctrine Applied as Defined in Decisions of National Courts.**—Decisions of state courts and laws of the several states do not govern in determining the application of the doctrine of assumption of risk in actions under the federal act. On the contrary this defense is to be applied as construed and defined by the decisions of the national courts.<sup>3</sup>

Under the rulings of the United States Supreme Court an employe of a railroad engaged in interstate commerce, whether he is actually aware of them or not, assumes such damages and risks as are ordinarily incident to his employment and he also assumes the risks due to the negligence of his employer when he becomes aware of the defect and of the risk arising from it or when such defects and risks are so open and obvious that an ordinarily prudent person would have observed and appreciated them and then continues in the service without complaint.<sup>4</sup>

3. *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n; *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033; *Glenn v. Cincinnati, N. O. & T. P. Ry. Co.*, 157 Ky. 453; *Seaboard A. L. Ry. Co. v. Moore*, 228 U. S. 433, 57 L. Ed. 907, 3 N. C. C. A. 812; *contra*, *Fish v. Chicago, R. I. & P. Ry. Co.*, — Mo. —, 172 S. W. 340.

4. *Gila V. G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 1 N. C. C. A. 362, 4 N. C. C. A. 231n; *Texas P. R. Co. v. Harvey*, 228 U. S. 319, 57 L. Ed. 852, *Choctaw, O. & G. R. Co. v. McDade*,

In the Horton cases cited the United States Supreme Court, defining assumption of risk under the federal act, said: "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such risks as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. *Choctaw, Oklahoma & Gulf R. Co. v. McDade*, 191 U. S. 64, 68 (48 L. Ed. 96); *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 220 U. S. 590, 596 (4 N. C. C. A. 483n); *Tex. & Pac. Ry. Co. v. Harvey*, 228 U. S. 319, 321 (57 L. Ed. 852); *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 102 (58 L. Ed. 521, 1 N. C. C. A. 362, 4 N. C. C. A. 231n), and cases cited. When the

191 U. S. 64, 48 L. Ed. 96; *Schlemmer v. Buffalo R. & P. R. Co.*, 220 U. S. 590, 55 L. Ed. 596, 4 N. C. C. A. 483n, *aff'g* 220 Pa. 470; *Emanuel v. Georgia & F. Ry. Co.*, — Ga. —, 83 S. E. 230.







employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative as assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise. *Hough v. Railway Co.*, 100 U. S. 213, 224 (25 L. Ed. 612); *Southwestern Brewery v. Schmidt*, 226 U. S. 162, 168 (57 L. Ed. 170). This branch of the law of master and servant seems to be traceable to *Holmes v. Clarke*, 6 Hurl. & Norm. 348; *Clarke v. Holmes*, 7 Hurl. & Norm. 937." In another recent case before the Supreme Court, the plaintiff had been injured while riding a three-wheeled gasoline car on the railroad track of defendant. The car was derailed due to a defective condition of the flange of one of the wheels. The plaintiff did not know of the defect and had not been working with the car but two or three days. The lower court gave this instruction on assumption of risk to the jury: "The true test is not in the exercise of ordinary care, to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk

arising out of a defective appliance provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances.” Concerning this instruction the Supreme Court said: “This, we think, was a correct instruction under the circumstances of the case. An employe assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer’s negligence. But the employe has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer’s negligence, until the employe becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employe with the assumption of risk attributable to a defect due to the employer’s negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it. *Union Pacific Railway Co. v. O’Brien*, 161 U. S. 451, 457 (40 L. Ed. 766); *Texas & Pacific Railway v. Archibald*, 170 U. S. 665, 671 (42 L. Ed. 1189); *Choctaw, Oklahoma & C. R. R. Co. v. Swearingen*, 196 U. S. 51, 62 (49 L. Ed.





382); *Burns v. Delaware & Atlantic Telegraph Co.*, 70 N. J. Law, 745, 752 (67 L. R. A. 956).''<sup>5</sup>

**§ 99. Concrete Instruction Must be Given, if Requested.**—In instructing the jury on the question of assumption of risk a concrete instruction applicable to the phase of the evidence should be given; and the court should not couch the instruction in such general and sweeping language that it is not calculated to give the jury an accurate understanding of the law upon the subject.<sup>6</sup> In an action under the federal act, the plaintiff, an engineer, was injured by the explosion of a water glass on which the gauge was missing. The United States Supreme Court held that the state trial court committed reversible error in refusing to give the following instruction: "If you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use."''<sup>7</sup>

**§ 100. When Assumption of Risk Is Not a Defense—Federal Safety Appliance Act.**—In any action for injuries based upon a violation by a railroad com-

5. *Gila V. G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 1 N. C. C. A. 362, 4 N. C. C. A. 231n.

6. *Norfolk & W. Ry. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 3 N. C. C. A. 806, Ann. Cas. 1914 C 172n.

7. *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n.

pany of any federal statute enacted for the safety of employes, such as the Federal Safety Appliance Act, if it is shown that the injury is due to a violation of such federal statutory laws, the doctrine of assumption of risk is absolutely wiped out and is no defense whatever to an action under the federal act. The language of § 4 of the act makes this proposition clear and it has been so construed by the courts without dissent.<sup>8</sup> Passing upon a requested instruction in an action for violation of the Safety Appliance Act which charged that if the plaintiff knew the defect and the risk arising therefrom, he could not recover, the Supreme Court of the United States in the *Crockett* case said: "Upon the merits, we of course sustained the contention that by the Employers' Liability Act the defense of assumption of risk remains as at common law, saving in the cases mentioned in § 4, that is to say: 'Any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.'" A few courts had held that the clause "any statute enacted for the safety of employes," included state statutes as well as federal. The result of this ruling would have been that assumption of risk under the national law would have been an absolute defense to the same acts in some states and not in others, thus destroying the uniformity of the applicability of the federal law throughout the nation. Such a contention was condemned by the Supreme Court of the United

8. *Southern Ry. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 6 N. C. C. A. 94n.







States in the following language: "By the phrase 'any statute enacted for the safety of employes,' Congress evidently intended federal statutes, such as the Safety Appliance Acts (March 2, 1893, c. 196, 27 Stat. 531, 6 Fed. Stat. Ann. pp. 752-756; March 2, 1903, c. 976, 32 Stat. 943, 10 Fed. Stat. Ann. p. 375; April 14, 1910, c. 160, 36 Stat. 298, Fed. Stat. Ann. 1912 Supp. p. 335; February 17, 1911, c. 103, 36 Stat. 913, Fed. Stat. Ann. 1912 Supp. p. 339); and the Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415, Fed. Stat. Ann. 1909 Supp. p. 581). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employes in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employes, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer."

**§ 101. When Assumption of Risk Is No Defense When There Is a Plurality of Causes.**—Where the injury to an employe is due to two acts contributing as proximate causes, notwithstanding the fact that the employe assumes the risk from one of these causes, assumption of risk is no defense to the action if the other proximate cause is one for which the master is liable and is not an ordinary risk of the employment or one of which the employe has no constructive or actual knowledge.<sup>9</sup>

9. Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1.

**§ 102. Violations of Rules Not Assumption of Risk.**

—In an action under the federal act, the defendant pleaded in its answer that the plaintiff had contributed to his own injury by violating one of its rules governing employees and that he therefore assumed the risk. The court held that such a fact, even if proven, did not show assumption of risk for the reason that such a defense is referable to contributory negligence and not to assumption of risk.<sup>10</sup>

**§ 103. Distinction Between Assumption of Risk and Contributory Negligence.**—The distinction between assumption of risk and contributory negligence under the federal act is important for the reason that, except as to violations of federal statutes for the protection of employees, assumption of risk is an absolute defense and contributory negligence only reduces the damages. As construed by the United States Supreme Court an employee assumes the ordinary risks and hazards of his occupation and also those defects and risks which are known to him, or are plainly observable, although due to the master's negligence. Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires.<sup>11</sup>

In an action under the Federal Employers' Liability Act, the Supreme Court of the United States described the distinction in the following language:

10. *Oberlin v. Oregon W. R. & N. Co.*, — Ore. —, 6 N. C. C. A. 75n, 79n, 95n, 188n, 142 Pac. 554; *Carter v. Kansas City S. Ry. Co.*, — Tex. Civ. App. —, 4 N. C. C. A. 634n, 155 S. W. 638.

11. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. Ed. 596, 4 N. C. C. A. 483n, *aff'g* 222 Pa. 470.





“And, taking §§ 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employe, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible. The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe.”<sup>12</sup>

**§ 104. Cases in Which Interstate Employes Were Held Not to Have Assumed the Risk.**—Railroad employes engaged in interstate commerce were held in actions under federal act not to have assumed the risk under the following facts. Decedent while engaged in cleaning snow from the tracks of a railway

12. *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n.

company when there was mist, smoke and some snow, was killed by a train bound from New York to Philadelphia. At the place of the accident there were four main lines of trackage. Shortly after 9:00 o'clock in the morning the men working with plaintiff were warned to step off track No. 4 by the call of the foreman in order to let a local train by. The decedent and two others were working on track 2. There was no call to them, the practice of the foreman being to designate the track in his warning, the men on the other track continuing to work. The New York train struck the decedent while he was working on track No. 2 and it approached without any signal or warning. The local train was slow and the New York train came fast and while the men were attracted by the first, the other rushed upon them. The defendant produced testimony in conflict with these facts shown by the plaintiff. Speaking of the legal effect of this evidence on the question of assumption of risk Mr. Justice McKenna, for the court, said: "It is hence contended by the railway company that McGovern assumed the risk of the situation, and that, therefore, it was error for the district court to refuse to give an instruction which presented that contention. We have given the testimony in general outline, but enough to show that what conflict there was in it was for the jury to judge and what deductions there were to be made from it were for the jury to make. And the district court, being of this view, refused to charge the jury, as we have seen, that McGovern had assumed the risk of the situation.







We cannot say that, as a matter of law, the court was mistaken.”<sup>13</sup>

In another case the Supreme Court again held that a deceased employe did not assume the risk under the circumstances hereinafter detailed.<sup>14</sup> The decedent was an engineer on a freight train proceeding southward on a lead track in a railroad yard. Ahead of him there were some cars on a yard track. While visible to the engineer from the right side they became more and more invisible as the train advanced. The engineer asked the fireman who was on the left side of the engine and in full view of the cars, whether they were clear of the lead track and was answered that they were. There was a dispute as to whether a head brakeman was riding in the cab and whether he called the engineer's attention to the fact that the coal cars were not in the clear. But there was no dispute that the engineer again asked the fireman who answered that the cars were not clear and jumped from the locomotive. The

13. *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, — L. Ed. —.

14. *Yazoo & M. V. R. Co. v. Wright*, 235 U. S. 376, — L. Ed. —, aff'g same case reported in 125 C. C. A. 25, 207 Fed. 281, 197 Fed. 94. In this case the Supreme Court ignored the rule as to assumption of risk announced by Judge McCall, the trial judge, to the effect that the employe does not in any case assume the risk due to the master's negligence (see § 97, *supra*); but the court held that, on the facts, it would not declare as a matter of law that the engineer knew of the danger or must be presumed to have known of it. The cases holding that an employe assumes the risk due to the master's negligence when the defect and danger arising from it, is known or is plainly observable, and then continues in the employment without complaint, were cited by the court with approval. See § 98, *supra*; *Gila V. G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 1 N. C. C. A. 362, 4 N. C. C. A. 231n.

engineer shut off his power and stepped to the left side, where, from the collision which immediately resulted, he was injured and died. Concerning these facts the court in denying that as a matter of law the decedent had assumed the risk, said: "Whatever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent, since the facts as stated above absolutely preclude all inference that the engineer knew or, from the facts shown, must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train." The court in this case cited with approval several of its former opinions in which the assumption of risk was discussed and these cases are given in the notes.<sup>15</sup> A switchman was jarred from the narrow rim of the pilot of a "road" engine while it was being used at night in the yards as a switch engine. The court held that whether he assumed the risk was a ques-

15. *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. Ed. 766; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188, 4 Am. Neg. Rep. 746; *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 47 L. Ed. 905, 13 Am. Neg. Rep. 695; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96, 15 Am. Neg. Rep. 230; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 12, 51 L. Ed. 681, 686, 1 N. C. C. A. 859n, 4 N. C. C. A. 483n, rev'g 207 Pa. 198; s. c., 220 U. S. 590, 55 L. Ed. 596, 4 N. C. C. A. 483n, aff'g 222 Pa. 470; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 503, 504, 58 L. Ed. 1062, 1069, 1070, 6 N. C. C. A. 75n, 101, 102n.





tion for the jury.<sup>16</sup> A brakeman in the nighttime was ordered by the yard master to couple up an air hose between two cars and it was necessary to do this by hand. The brakeman was required to step within the tracks and attach the two ends of the air hose together. While so at work he was struck by the car to which he had been ordered to couple and this was caused by other cars being negligently "kicked" against it by other employes. The court held that the plaintiff did not assume the risk.<sup>17</sup> A freight conductor did not assume the risk of the negligence of a flagman working under him who failed to protect the rear of the train.<sup>18</sup> A railway employe who had been working only three or four days on a three-wheeled gasoline car did not assume the risk from a defective flange on the wheel of the car of which he was ignorant and it did not appear to be a part of his duty to inspect the wheel or to look after its condition.<sup>19</sup> An employe of a railroad company who was injured in a collision did not assume the risk of an injury from the negligence of a railroad company in permitting the engine to be used in pulling a train which leaked steam so that the engineer could not see a train ahead of him.<sup>20</sup> A track laborer repairing a switch at night in the terminal yards of a railroad company did not assume the risk of injury due to

16. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321, 6 N. C. C. A. 86n, 106n.

17. *Chesapeake & O. R. Co. v. Proffit* (C. C. A.), 218 Fed. 23.

18. *Pennsylvania Ry. Co. v. Goughnor*, 126 C. C. A. 39, 208 Fed. 961.

19. *Gila V. G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 1 N. C. C. A. 362, 4 N. C. C. A. 231n.

20. *Niles v. Cent. V. Ry. Co.*, 87 Vt. 356, 6 N. C. C. A. 75n.



the negligence of the company in causing cars to be upon the track on which he worked under their own momentum and without any warning or signal.<sup>21</sup> An employe injured by striking an unlighted switch stand too close to the track did not assume the risk of injury therefrom.<sup>22</sup> A section man who was hurt while assisting an employe in taking a motor car off of a railroad track in order to allow a train to pass did not assume the risk of injury on account of an insufficient number of men to assist him as he had no time to deliberate and determine whether the car could be taken off the track by two men with safety.<sup>23</sup> A brakeman injured because of a defective fastening in a car door, did not assume the risk of injury therefrom, it was held, for the reason that there was no evidence that he knew of the defect or could have known of it by exercising ordinary care.<sup>24</sup>

**§ 105. Cases in Which Interstate Employes Were Held to Have Assumed the Risk.**—Employes engaged in interstate commerce were held by the courts to have no remedy under the federal act because of assumption of risk, under the following circumstances: An engineer while his train was moving, climbed on top of the coal in the tender to ascertain the amount of water in the tank by looking through a man hole at the rear end of the tender, and while

21. *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832; s. c., 113 C. C. A. 379, 192 Fed. 901.

22. *Vickery v. New London N. Ry. Co.*, 87 Conn. 634, 4 N. C. C. A. 218n, 6 N. C. C. A. 76n, 93n, 230n.

23. *Missouri, K. & T. Ry. Co. v. Freeman*, — Tex. —, 5 N. C. C. A. 583n, 584n, 168 S. W. 69.

24. *Carter v. Kansas City S. Ry. Co.*, — Tex. Civ. App. —, 4 N. C. C. A. 634n, 155 S. W. 638.





returning, came in contact with an electric wire attached to an overhead bridge. He was instantly killed by the electric current. This wire was suspended over the center line of the tracks upon which the train was traveling and was used for the operation of trains by electricity. Passenger trains had been operated on this road for several years by electricity. The method for electrical operation was that known as the overhead system. The equipment required for this method consisted in part of steel structures by the side of and across the tracks for the support of wires running along the center lines of the rails. These wires were suspended at standard height, which was  $22\frac{1}{2}$  feet above the level of the top of the rails, but where there were overhead bridges it was necessary to depress them at those places. The court held, in an action under the federal act, for the death of the engineer, that the decedent assumed the risk and that there could be no recovery.<sup>25</sup> In so holding that the decedent had assumed the risk, the court said: "As bearing upon the question of the intestate's assumption of the risk which caused his death, the pertinent facts lie outside of the realm of dispute or uncertainty. They show that Bottomley had full knowledge of all the physical factors in the situation. As an engineer, he was familiar with engines and tenders and their proportions. The engine he was driving was one of moderate size, and of a type long in use. Its tender, whether of the large or smaller size, was one in use

25. *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 6 N. C. C. A. 444n, 445n, 448n, 452n.

with this type of engine. It was neither special nor unusual. In his years of experience, for the most part confined to this section of the road, and his recent months of frequent service upon it, as engineer, he must have become acquainted with the existence of the many overhead bridges which here span the tracks, with the narrow space between bridges and tops of engine and tender, and with the manner in which the electric service wires were strung in carrying them under the bridges. These conditions were apparent to casual observation; they had remained unchanged for years; and they were closely related to the performance of his duties. He must also have known that these wires were electrically charged for the operation of trains. As a locomotive engineer of experience living in this age of the world, he, untold and unwarned, must have been sufficiently intelligent and informed to know of the latent danger which lurked in the wires so charged to one who should come into contact with them or into their immediate vicinity, and of the extremity of that danger. But that matter aside, the knowledge of the danger had been so directly and forcibly brought home to him through the notices and warnings, given to him by the defendant that he could not have failed both to know the danger to his life that there would be in permitting himself to come into contact with or near to one of the wires, and to comprehend the character and extent of that danger. This being so, he certainly knew and comprehended the risk incident to his employment. No one could be expected to have better knowledge or







a more adequate appreciation. Possessed of this knowledge and appreciation, he had for years chosen to continue in his employment. By so doing he assumed its risk, which, during these years, had remained unchanged, and been unenhanced by any new act of the defendant which could by possibility be imputed to it as negligence.”

A railroad special agent stepped in between two cars of a train in a terminal yard without the knowledge of the trainmen in charge of the train. The court held that he assumed the risk of an injury from the movement of the train.<sup>26</sup> An engineer who knew that the gauge of the water glass on his engine was missing and with such knowledge continued to work without complaint was held to have assumed the risk.<sup>27</sup> A section laborer was engaged in removing 60 pound rails and substituting 100 pound rails on a switch track. The heavy rails had been deposited near the tracks a few days before the injury. One of these rails was carried to the track and laid down. The second rail was then carried to the tracks. A foreman was in charge of the work and the plaintiff was a member of the crew. When the crew reached the track some one of the crew gave the signal to throw the rail. When the rail was thrown, it rebounded and struck and injured plaintiff. There was some evidence to the effect that the rail brace which was used for the purpose of keeping

26. *Helm v. Cincinnati, N. O. & T. P. Ry. Co.*, 156 Ky. 240, 6 N. C. C. A. 83n, 84n.

27. *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n.

the 60 pound rails in position was not moved when the 60 pound rail was taken up and that the heavier rail, when thrown, struck the rail brace and this caused the rail to rebound. There was also evidence that the safer way to handle the rails was by use of rail tongs but it did not appear that such tongs were being used during the time of plaintiff's employment. The usual and customary way of moving the rails from one place to another was that adopted in handling the rail in question. The section crew picked it up with their hands, carried it to the place where it was needed and then, at the word of some member of the crew, dropped it on the ground. The plaintiff knew of the presence of the ties and of the presence of the rail brace. Under these facts the court said: "As the plaintiff's claim does not grow out of a violation of such statute (national safety statutes) the doctrine of assumed risk applies. Under that doctrine, the employe assumes those risks which are known to or are clearly observable by him. There was nothing complicated about the character of the work. The operation was simple. The brace and ties were clearly observable by the plaintiff. It is not insisted that the rail was dropped or thrown in a negligent manner. Being dropped without negligence, the danger of being struck by it was one of the risks ordinarily and usually incident to the employment and therefore one which plaintiff assumed."<sup>28</sup> Decedent was a boiler maker helper

28. *Truesdell v. Chesapeake & O. Ry. Co.*, 159 Ky. 718. Under quite similar facts, Judge Trimble of the Kansas City Court of Appeals reached the same conclusion of nonliability on other grounds. *Neith v. Delano*, *Rec. of Wabash R. Co.*, — Mo. App. —, 171 S. W. 1.





and came to his death in the machine shops of a railroad company. In these shops were a number of tracks and between these tracks were what are known as "drop pits," nine feet deep and about 16 feet long which were used when large driving wheels were taken off of locomotives. The pit was used so as to avoid the necessity of jacking up the locomotive and so that the driving wheels could be dropped into the pit. There was a cover over about one-third of this pit at either end but no cover over about one-third of it in the center. An engine was not placed over this pit unless the wheels were to be taken off. Decedent had been working the shops for some time and understood the premises perfectly. The decedent was found at the bottom of the pit under circumstances showing that he fell into it, his head having struck against the concrete bottom and this caused his death. The accident occurred after dark. There were lights in the shop but the proof tended to show that these lights did not shine upon the drop pit and did not sufficiently illuminate it. There were no barriers around the pit and no cover over one-third of it. The drop pit was only a few feet from where the decedent had been working all day and he knew where it was. On these facts the trial court sustained a demurrer to the evidence on the ground of assumption of risk in a suit under the Federal Employers' Liability Act and the court's action was sustained by the court of appeals.<sup>29</sup> A railroad employe who worked 54 out of 57 hours for an interstate railroad company in assisting to water

29. *Glenn v. Cincinnati, N. O. & T. P. Ry. Co.*, 157 Ky. 453.

and feed cattle in transit unloaded for feed, rest and water, assumed the risk of injury due to a fall from a switch engine claimed to have been caused by his exhausted condition, as he knew better than anyone else his condition as to whether he was taking any risks in continuing to work under such circumstances.<sup>30</sup>

**§ 106. Defense of Assumption of Risk Must Be Pleaded to Be Available.**—Unless from all the evidence introduced by the plaintiff in an action under the federal act, the court can conclude as a matter of law that the plaintiff assumed the risk, the defense of assumption of risk is not available to a defendant in an action under the statute unless pleaded in the answer.<sup>31</sup> In the Vickery case, cited in the notes, defendant insisted that the plaintiff had assumed the risk of a switch stand being erected too close to a railroad track without a warning light. To this contention the court said: “The risk here complained of arose, as alleged, from the negligent erection of a switch stand in dangerous proximity to one of the tracks in the railroad yard and the negligent failure to have a warning light upon it. This was not a risk ordinarily incident to the railroad service in which the plaintiff as a brakeman was employed but one arising from the defendant’s negligence. The plaintiff may have known of it and have voluntarily assumed it but he did not do so by entering

30. *Schweig v. Chicago, M. & St. P. R. Co.* (C. C. A.), 216 Fed. 750, aff’g same case reported in 205 Fed. 96.

31. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 4 N. C. C. A. 218n, 6 N. C. C. A. 76n, 93n, 230n; *Lloyd v. Southern Ry. Co.*, — N. C. —, 6 N. C. C. A. 190n, 81 S. E. 1003.







into his employment. If such was the fact, it was incumbent upon the defendant to plead and prove.”

**§ 107. Confusing Assumption of Risk with Contributory Negligence in Jury Instructions Under Federal Act.**—The Supreme Court of Appeals of Virginia in an opinion handed down in March, 1914,<sup>32</sup> analyzed and reviewed many decisions of the national and state courts discussing and applying the doctrine of assumption of risk under the federal act.<sup>33</sup> In the Jacobs case the question before the court was whether a railroad brakeman assumed the risk of injury from a pile of cinders negligently permitted to accumulate alongside of the track in a railroad yard which the jury found, under the instructions of the court, constituted a defect or insufficiency due to the negligence of the company. Over the objections of the railroad company, on the question of assumption of risk, the court instructed the jury as follows: “The court further instructs the jury that knowledge by the plaintiff of the unsafe condition of the said road-

32. *Southern Ry. Co. v. Jacobs*, — Va. —, 6 N. C. C. A. 94n, 186n, 81 S. E. 99.

33. The cases cited, analyzed and discussed, were the following: *Seaboard A. L. Ry. Co. v. Moore*, 228 U. S. 443, 57 L. Ed. 907, 3 N. C. C. A. 812; *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n; *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Central V. Ry. Co. v. Bethune*, 124 C. C. A. 528, 206 Fed. 868; *Barker v. Kansas City M. & O. Ry. Co.*, 88 Kan. 767, 43 L. R. A. (N. S.) 1121; *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033; *Choctaw & G. Ry. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96; *Schlemmer v. Buffalo R. & P. Ry. Co.*, 205 U. S. 1, 51 L. Ed. 681, 1 N. C. C. A. 859n, 4 N. C. C. A. 483n, rev'g 207 Pa. 198; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188.

way is of itself no defense to an action for an injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence which contributed to produce the injury mentioned in the declaration, but the fact that the plaintiff may himself have been guilty of contributory negligence was not a bar to a recovery, but the damages shall be diminished in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances."

The defendant on the other hand requested the court to instruct the jury as follows which request was denied by the trial court: "A. The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witness for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant."

The court held that, under the facts, the defend-





ant's refused instruction should have been given and that it was error to give plaintiff's second instruction for the reason that under the federal statute assumption of risk is an absolute defense as at common law, the court holding that an employe assumes the risk of injury from defective appliances furnished by his employer only when the defect is known to, or plainly observable by, the employe. Reviewing the cases cited in the preceding note, the court said: "The cases might be multiplied to any extent to show that the doctrine of assumed risks covers more than those risks which are ordinarily incident to the business, and embraces the use of defective appliances and work of almost every description where the employe, with knowledge of the defect, continues to use it without notice to the employer."

**§ 108. Assumption of Risk Eliminated in Actions for Violation of Hours of Service Act.**—In any action under the federal act for an injury to an employe within its terms if the injury or death is caused by a violation of the Federal Hours of Service Act <sup>34</sup> assumption of risk is not a defense to the action.<sup>35</sup>

34. Hours of Service Act, March 4, 1907 c. 2939, 34 Stat. 1415.

35. *Schweig v. Chicago, M. & St. P. R. Co.* (C. C. A.), 216 Fed. 750, *aff'g* same case reported in 205 Fed. 96.

## CHAPTER VII

### CONTRIBUTORY NEGLIGENCE UNDER FEDERAL ACT

- § 109. The Statutory Provision.
- § 110. Right of Recovery Under Federal Act Not Barred by Contributory Negligence.
- § 111. When Contributory Negligence of Employee Does Not Diminish Damages—Federal Safety Appliance Act.
- § 112. Contributory Negligence Defined.
- § 113. How Damages Apportioned When Employee Is Guilty of Contributory Negligence.
- § 114. Apportionment of Damages Under Federal Act Different from Georgia Statute.
- § 115. Employee's Contributory Negligence to Reduce Damages Must Proximately Contribute to Injury.
- § 116. Gross Negligence of Plaintiff and Slight Negligence of Defendant Cannot Defeat Recovery.
- § 117. When Defendant's Act Is No Part of Causation, Plaintiff Cannot Recover.
- § 118. Erroneous Instructions on Contributory Negligence Under the Federal Act.
- § 119. Whether Contributory Negligence Must Be Pleaded, Determined by State Law.

**§ 109. The Statutory Provision.**—Section 3 of the Federal Employers' Liability Act provides: "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages







shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

**§ 110. Right of Recovery Under Federal Act Not Barred by Contributory Negligence.**—When an employe of a common carrier by railroad is injured or killed under the conditions prescribed in the federal act, that is, while the carrier is engaged and while the servant is employed by it in interstate commerce, in any action for damages for such injuries due to negligence, the right to recover cannot be defeated by showing or proving that the employe's negligence contributed in any degree to his injuries. In this respect the statute is a radical departure from the common law doctrine. In all actions under the federal act the employe's contributory negligence merely diminishes the amount of his damages except in cases mentioned in the next section.<sup>1</sup>

1. *Pennsylvania R. Co. v. Cole* (C. C. A.), 214 Fed. 948; *Louisville & N. R. Co. v. Heinig*, — Ky. —, 171 S. W. 853; *Grand T. W. R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 6 N. C. C. A. 90, 91n, Ann. Cas. 1914 C 168n; *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 3 N. C. C. A. 806, Ann. Cas. 1914 C 172n; *Southern Ry. Co. v. Smith* (C. C. A.), 214 Fed. 942; *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744; *Louisville & N. R. Co. v. Wene* (C. C. A.), 202 Fed. 887; *McDonald v. Railway T. Co.*, 121 Minn. 273; *Atchison, T. & S. F. R. Co. v. Tack*, — Tex. Civ. App. —, 130 S. W. 596; *Colasurdo v. Central R. Co. of New Jersey*, 180 Fed. 832, aff'd in 113 C. C. A. 379, 192 Fed. 901; *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 5 N. C. C. A. 583n, 153 S. W.

**§ 111. When Contributory Negligence of Employee Does Not Diminish Damages—Federal Safety Appliance Act.**—Even though an employee injured or killed while engaged in interstate commerce was guilty of contributory negligence, his damages cannot be reduced when the violation of a federal statute enacted for the safety of employees, such, for instance, as the Federal Safety Appliance Act, contributed as a cause to the injury or death.<sup>2</sup> The clause “statute enacted for the safety of employees” in § 3 of the Federal Employers’ Liability Act refers only to federal statutes and not to state laws.<sup>3</sup>

**§ 112. Contributory Negligence Defined.**—Contributory negligence under the Federal Employers’ Liability Act has been defined by the United States Supreme Court in the following language: “Contributory negligence involves the notion of some fault or breach of duty on the part of the employee,

937; *Neil v. Idaho & W. N. R. Co.*, 22 Idaho 74; *Fogerty v. Northern P. R. Co.*, — Wash. —, 133 Pac. 609; *Fleming v. Norfolk S. Ry. Co.*, 160 N. C. 196, 6 N. C. C. A. 78n, 229n; *Southern Ry. Co. v. Hill*, 139 Ga. 549; *Ellis v. Louisville, H. & St. L. Ry. Co.*, 155 Ky. 745, 6 N. C. C. A. 103n, 543n; *Nashville, C. & St. L. Ry. Co. v. Henry*, 158 Ky. 88, 4 N. C. C. A. 495n, 6 N. C. C. A. 99n, 106n; *Nashville, C. & St. L. Ry. Co. v. Banks*, 156 Ky. 609, 6 N. C. C. A. 99n, 105n, 186n; *Pankey v. Atchison, T. & S. F. Ry. Co.*, 180 Mo. App. 185; *Cain v. Southern Ry. Co.*, 199 Fed. 211; *Pfeiffer v. Oregon W. R. & N. Co.*, — Ore. —, 7 N. C. C. A. 685, 144 Pac. 762; *Ross v. St. Louis & S. F. Ry. Co.*, — Kan. —, 144 Pac. 844; *Tilgham v. Seaboard A. L. Ry. Co.*, — N. C. —, 83 S. E. 315.

2. *Southern Ry. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 6 N. C. C. A. 94n; *Grand T. W. Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 6 N. C. C. A. 90, 91n, Ann. Cas. 1914 C 168n; *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 3 N. C. C. A. 806, Ann. Cas. 1914 C 172n.

3. *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n.





and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use.”<sup>4</sup> In another case before the Supreme Court of the United States the following definition of contributory negligence was approved: “Contributory negligence is the negligent act of a plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury.”<sup>5</sup>

**§ 113. How Damages Apportioned When Employee Is Guilty of Contributory Negligence.**—Where the negligence which caused the injury or death of an employe is partly attributable to the employe himself and partly attributable to the carrier, the plaintiff cannot recover full damages but only such a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.<sup>6</sup> Justice Vandevanter, speaking for the Supreme Court in the case cited, said: “The statutory direction that the diminution shall be ‘in proportion to the amount of negligence attributable to such employe’ means that, where the causal negligence is partly attributable to him and partly to the car-

4. Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 6 N. C. C. A. 75n, 95n, 101, 102n.

5. Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 3 N. C. C. A. 806, Ann. Cas. 1914 C 172n.

6. Norfolk & W. Ry. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 3 N. C. C. A. 806, Ann. Cas. 1914 C 172n.



rier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such cases and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employe."

**§ 114. Apportionment of Damages Under Federal Act Different from Georgia Statute.**—Even prior to the passage of the Federal Employers' Liability Act, a few states had by statutory enactment adopted the doctrine of comparative negligence as distinguished from contributory negligence. The Georgia statute respecting the apportionment of damages has been construed to mean that where the injury is the result of mutual negligence there can be no recovery unless the person inflicting the injury is more in fault than the one who is injured. But such rule is not to be applied in the apportionment of damages under the federal act for if the carrier's negligence caused the injury in part, the contributory negligence of the employe does not defeat the action no matter if the carrier is less in fault than the employe.<sup>7</sup>

**§ 115. Employe's Contributory Negligence to Reduce Damages Must Proximately Contribute to Injury.**—The damages recoverable by an employe for injuries due to the negligence of a common carrier cannot be reduced by reason of any slight negligence

7. *Southern Ry. Co. v. Hill*, 139 Ga. 549.





on the part of the employe. Before the damages can be reduced the contributory negligence of the employe must directly and proximately contribute to the injury. In other words, the negligence of the employe in order to reduce the damages, must be causal.<sup>8</sup>

**§ 116. Gross Negligence of Plaintiff and Slight Negligence of Defendant Cannot Defeat Recovery.—**

Under the federal act if the carrier is negligent in any degree and such negligence contributes as a proximate cause to the injury, plaintiff's right to recover cannot be defeated although his negligence might have been gross and the negligence of the defendant comparable therewith slight.<sup>9</sup> And a demurrer to the evidence or a nonsuit cannot in any case under the federal act be given or sustained on the ground of plaintiff's contributory negligence.<sup>10</sup> Judge Knappen, speaking for the Federal Circuit Court of Appeals in *Pennsylvania Co. v. Cole*, cited *supra*, said: "But the Employers' Liability Act expressly abrogates the common law rule under which action was barred by the negligence of the plaintiff proximately contributing to the accident and sub-

8. *Illinois C. R. Co. v. Porter*, 207 Fed. 311, 6 N. C. C. A. 98n, 205n.

9. *New York, C. & St. L. R. Co. v. Niebel* (C. C. A.), 214 Fed. 952; *Pennsylvania Co. v. Cole* (C. C. A.), 214 Fed. 948; *Louisville & N. R. Co. v. Heinig*, — Ky. —, 171 S. W. 853; *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. Cas. (D. C.) 123, 1 N. C. C. A. 841n; *Louisville & N. Ry. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321, 6 N. C. C. A. 86n, 106n.

10. *Sandidge v. Atchison, T. & S. F. Ry. Co.*, 113 C. C. A. 653, 193 Fed. 867; *Horton v. Seaboard A. L. Co.*, 157 N. C. 146; *Louisville & N. Ry. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887.

stitutes therefor the rule of comparative negligence. Under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery.”

**§ 117. When Defendant's Act Is No Part of Causation, Plaintiff Cannot Recover.**—On the other hand if the plaintiff's act is the sole cause of his injury without any act on the part of the defendant contributing as a part of the causation, there can be no recovery under the federal act.<sup>11</sup> Whether under the facts of a particular case the plaintiff's negligence was the sole cause of his injury or whether the negligence of the defendant contributed as a part of the causation has already been raised in cases under the federal act and it is frequently a difficult question to solve. Such questions will no doubt arise in the future in other cases for the reason that if the plaintiff's negligence was the sole cause of his injury there can be no recovery but if the defendant's negligence contributes as a proximate cause, the plaintiff can recover no matter how gross his negligence may be. In two cases, *Pankey v. Railroad* and *Ellis v. Railroad*, cited *supra*, the courts denied a recovery under the federal act for the reason that under the facts the plaintiff's act was the sole cause of his injury. On the other hand courts have denied the application of the same principle under the facts and

11. *Grand T. Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 6 N. C. C. A. 90, 91n, Ann. Cas. 1914 C 168n; *Pankey v. Atchison, T. & S. F. Ry. Co.*, 180 Mo. App. 185; *Ellis v. Louisville, H. & St. L. Ry. Co.*, 155 Ky. 745, 6 N. C. C. A. 103n, 543n; *Pfeiffer v. Oregon, W. R. & N. Co.*, — Ore. —, 7 N. C. C. A. 685, 144 Pac. 762.







held the defendant's act was a part of the causation.<sup>12</sup>

**§ 118. Erroneous Instructions on Contributory Negligence Under the Federal Act.**—In an action under the federal act, a trial court instructed the jury as to the effect of contributory negligence as follows: “Contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the negligence of the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.” The phrase in the quoted instruction, “as compared with the negligence of the defendant”

12. *Pennsylvania Co. v. Cole* (C. C. A.), 214 Fed. 948; *New York, C. & St. L. R. Co. v. Niebel* (C. C. A.), 214 Fed. 952; *Louisville & N. R. Co. v. Heinig*, — Ky. —, 171 S. W. 853; *Ross v. St. Louis & S. F. Ry. Co.*, — Kan. —, 144 Pac. 844; *Spokane & I. E. R. Co. v. Campbell*, 217 Fed. (C. C. A.) 518.

was condemned by the Supreme Court of the United States as being improper under the federal act.<sup>13</sup> Concerning this instruction Mr. Justice Vandevanter, speaking for the court, said: "The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a pro-

13. *Norfolk & W. Ry. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 3 N. C. C. A. 806, Am. Cas. 1914 C 172n.





portional part of the damages, corresponding to the amount of negligence attributable to the employe. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 50, 56 L. Ed. 327, 346 (1 N. C. C. A. 875), 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169."

An instruction that if the employe was guilty of negligence which contributed to his injuries, the jury must diminish the damages in proportion to the amount of negligence attributable to him, was held erroneous for the same reason.<sup>14</sup> In another action under the federal act the court instructed the jury that, if the deceased was guilty of contributory negligence, and "that said negligence directly contributed to his injury, you should take said negligence into consideration in arriving at the amount of your verdict as hereinafter explained, if you find from the evidence that the plaintiff is entitled to recover, but if you find from the evidence that the contributory negligence of the deceased, Otto N. Ross, was the sole and proximate cause of his death, then you should find a verdict for the defendant." A verdict was returned for the defendant and the trial court set it aside because the instruction was erroneous in the latter part as to contributory negligence. The appellate court held that the plaintiff had a right to a plain and unambiguous instruction to the effect that contributory negligence was not a complete defense under the federal statute referred to, but should be considered in mitigation of damages; and

14. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 6 N. C. C. A. 99n, 105n, 186n.

that, as the language used was doubtful in meaning and confusing, and the trial judge believed that the instruction did not sufficiently inform the jury, the order granting a new trial was not reversed.<sup>15</sup>

**§ 119. Whether Contributory Negligence Must Be Pleaded, Determined by State Law.**—The question whether contributory negligence of the injured employe in order to be available to the defendant must be pleaded is to be determined by the laws of the state where the action is pending for such a matter relates to procedure and the laws of the state govern as to procedure even in actions under the Federal Employers' Liability Act. The general rule is that unless the plaintiff's contributory negligence appears as a matter of law by his proof the plea of contributory negligence must be specially pleaded; though a few courts hold to the contrary; but as contributory negligence under the federal act only mitigates the damages it is at least questionable whether it must be specially pleaded for the general rule is, unless otherwise provided by statute, matters in diminution of damages need not be specially pleaded. Such was the rule at common law.<sup>16</sup> A statute of North Carolina provides that "in all actions to recover damages by reason of defendant's negligence, where contributory negligence is relied on as a defense, it shall be set up in the answer and proved at the trial." Another section of the statutory law

15. *Ross v. St. Louis & S. F. Ry. Co.*, — Kan. —, 144 Pac. 844.

16. *Greeneleaf on Evidence* (14th Ed.) 393; *Beck v. Dowell*, 40 Mo. App. 71; *Smith v. Lisher*, 23 Ind. 502; *Osborn v. Lovell*, 36 Mich. 250; *Delevan v. Bates*, 1 Mich. 97; *Blizzard v. Applegate*, 61 Ind. 368; *Atteberry v. Powell*, 29 Mo. 429, 77 Am. Dec. 579.







of the same state provided generally that matters in diminution of damages need not be specially pleaded. In an action by an employe against a common carrier for injuries under the Federal Employers' Liability Act, it was held by the supreme court of that state that the defendant could not avail itself of the partial defense of contributory negligence unless the same was pleaded in its answer. The court properly held that the specific statute mentioned controlled in preference to the general statute as to matters in mitigation.<sup>17</sup>

17. *Fleming v. Norfolk S. Ry. Co.*, 160 N. C. 196, 6 N. C. C. A. 78n, 229n.

## CHAPTER VIII

### CONTRACTS FORBIDDEN BY FEDERAL ACT

§ 120. The Statutory Provision.

§ 121. Statute Prohibiting Carriers from Evading Liability by Contracts or Regulations, Valid.

§ 122. Statute Applies to Existing as Well as Future Contracts.

§ 123. Acceptance of Benefits from Employer No Bar to Suit Against Joint Tort-feasor.

**§ 120. The Statutory Provision.**—Section 5 of the Federal Employers' Liability Act provides: "That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought."

**§ 121. Statute Prohibiting Carriers from Evading Liability by Contracts or Regulations, Valid.**—The question of the validity of the contract provision quoted in the foregoing paragraph has been finally established by the United States Supreme Court.<sup>1</sup>

1. Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911, 1 N. C. C. A. 892, 6 N. C. C. A. 103n; Burnett v. Atlantic





In the Schubert case the plaintiff was an employe of the defendant. The company pleaded that the plaintiff was at the time a member of its "relief fund" under a contract of membership in which it was agreed that the company should apply as a voluntary contribution from his wages a certain sum a month for the purpose of securing certain benefits and it was also stipulated that the acceptance of benefits by an employe after injury should constitute a release from all claims for damages. The plaintiff since his injury had voluntarily accepted benefits to the amount of \$75.00. A demurrer to this plea was sustained in the trial court. The appellate court held that Congress, in declaring by the statute that such contracts were void, did not exceed its authority and affirmed the cause.

**§ 122. Statute Applies to Existing as Well as Future Contracts.**—The provisions of § 5 applies to contracts made before the passage of the Federal Employers' Liability Act as well as to contracts entered into after the passage of the law.<sup>2</sup> In the case cited in the notes it was contended by the railroad company that the statute did not apply to contracts entered into before the statute was enacted and that if the court should take the view that the statute applied to preexisting contracts, that the law was

C. L. R. Co., 163 N. C. 186, 6 N. C. C. A. 103, 104n; Baltimore & O. R. Co. v. Gawinske, 116 C. C. A. 579, 197 Fed. 31; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. Ed. 328, construing a similar provision of the statute of Iowa; Hogarty v. Philadelphia R. Ry. Co., 245 Pa. 443.

2. Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911, 1 N. C. C. A. 892, 6 N. C. C. A. 103n.

invalid and unconstitutional. To this contention Justice Hughes, speaking for the Supreme Court, said: "Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority." <sup>3</sup>

**§ 123. Acceptance of Benefits from Employer No Bar to Suit Against Joint Tort-Ffeasor.—Although**

3. In reaching this conclusion the court cited and quoted from the following cases: *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228, 44 L. Ed. 136; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681; *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7n.







under the laws of a state, contracts between railroad companies and their employes which provide that if an employe accept benefits from a relief fund after receiving an injury, are deemed valid, yet, if such carrier and the employe were at the time of his injuries engaged in interstate commerce, the acceptance of benefit is not a bar in an action against a joint tort-feasor.<sup>4</sup> In the case cited the plaintiff was injured while working on his employer's cars which were being moved over another company's tracks, the latter being the owner and the former the licensee. The actionable negligence was permitting a semaphore post to be placed too close to the track. The plaintiff accepted his relief benefits from the company which employed him and sued the other company. The other company set up as a defense that he had accepted the benefits under his contract and that having therefore released one tort-feasor, the other was not liable. But the Supreme Court of Illinois held that since the federal act provided that such contracts were no longer a defense when the company was engaged in and the injured servant employed in interstate commerce, that such defense although valid under the laws of the state, could not inure to the benefit of the joint tort-feasor.

4. *Wagner v. Chicago & A. R. Co.*, — Ill. —, 106 N. E. 809. (Cartwright and Dunn, JJ., dissenting.)

## CHAPTER IX

### JURISDICTION OF STATE AND FEDERAL COURTS

- § 124. Suits May Be Brought in Federal Courts.
- § 125. Actions May Also Be Brought in State Courts Under Federal Act.
- § 126. Causes Instituted in State Courts Not Removable to Federal Courts.
- § 127. Removability When Petition States Cause of Action Under State Law in One Count and Under Federal Law in Another Count.
- § 128. Action Removable When Petition Does Not State Cause of Action Under Federal Act Although Intended to Be Under that Statute.
- § 129. Statute of Limitation.
- § 130. Judgment of Highest State Court in Action Under Federal Act May Be Reviewed by United States Supreme Court, When.
- § 131. Record Must Show Right Under Federal Laws Was Specifically Set Up and Denied by State Court.
- § 132. Contention That There Is or Is Not Sufficient Evidence to Show Liability, Will Support Writ of Error.
- § 133. Power to Review Does Not Extend to Questions Merely Incidental and Non-federal in Character.
- § 134. Ruling of State Court that Federal Question Was Sufficiently Raised Binding Upon United States Supreme Court.
- § 135. Federal Questions to Support Writ of Error to United States Supreme Court, Need Not Be Raised by the Pleadings.
- § 136. Pleading Federal Act and Submitting Case to Jury Under State Law, No Denial of Federal Right.
- § 137. When Petition Not Stating a Good Cause of Action Under Federal Act Raises a Federal Question.
- § 138. Claim that Verdict Is Excessive Not Reviewable by Writ of Error.

**§ 124. Suits May Be Brought in Federal Courts.—**  
One of the 1910 amendments to the Federal Employ-





ers' Liability Law, now § 6 of the act, provides that an action may be brought under the act in a circuit court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.

**§ 125. Actions May Also Be Brought in State Courts Under Federal Act.**—One of the amendments of 1910 to the federal act further provides that the jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states, and no case arising under the act and brought in any state court of competent jurisdiction, shall be removed to any court of the United States. Prior to the passage of the 1910 amendment the Supreme Court of Connecticut had held that state courts had no jurisdiction of actions under the Federal Employers' Liability Act.<sup>1</sup> But when this case reached the Supreme Court of the United States that court held that state courts had jurisdiction of actions under the federal act even before the amendment of 1910 and the decision of the state court was overruled.<sup>2</sup>

**§ 126. Causes Instituted in State Courts Not Removable to Federal Courts.**—Although the statute, in the amendment of 1910 plainly declares that no case arising under the federal act and brought in a state court of competent jurisdiction shall be removable to the federal courts, yet many attempts have

1. *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 17 Ann. Cas. 324.

2. *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44.



been made to remove such cases without, however, any success. Courts have declared that the right of removal from a state court by a foreign citizen is a right which may be taken away by Congress or given to a litigant. A cause under the federal act filed since the amendment of 1910 is not removable because of diversity of citizenship or any other ground.<sup>3</sup>

**§ 127. Removability When Petition States Cause of Action Under State Law in One Count and Under Federal Law in Another Count.**—A question of some difficulty has presented itself to the courts in determining whether a cause is removable in which the plaintiff has plead a cause of action under the state law in one count and under the federal act in another, the other jurisdictional grounds, such as diversity of citizenship, being present in the case. It was held by a federal district court in New York that although the facts pleaded in the petition showed a cause of action under the federal act and also under the state law, it was, nevertheless, a case arising under the Federal Employers' Liability Act and was not removable from the state courts notwithstanding the existence of diversity of citizen-

3. *Pankey v. Atchison, T. & S. F. Ry. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74; *McChesney v. Illinois C. R. Co.*, 197 Fed. 85; *DeAtley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591; *Kansas City S. Ry. Co. v. Cook*, 100 Ark. 467; *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 6 N. C. C. A. 202n, 447n; *Teel v. Chesapeake & O. Ry. Co.*, 123 C. C. A. 240, 204 Fed. 918, 6 N. C. C. A. 79n, 47 L. R. A. (N. S.) 21n; *Patton v. Cincinnati, N. O. & T. P. Ry.*, 208 Fed. 29; *Eng v. Southern P. Co.*, 210 Fed. 92, 6 N. C. C. A. 78, 79n, 200n; *Missouri, K. & T. R. Co. v. Bunkley*, — Tex. Civ. App. —, 5 N. C. C. A. 583n, 153 S. W. 937; *Kelly v. Chesapeake & O. R. Co.*, 201 Fed. 602; *Hulac v. Chicago & N. W. R. Co.*, 194 Fed. 747.





ship.<sup>4</sup> In another case before the same court it was held that since such a petition stated but one cause of action under the decision of the state courts, the cause was not removable.<sup>5</sup> The court, however, said: "In short, by pleading facts bringing the case within the federal act, and facts bringing the case within the common-law liability, and facts bringing it within the state statute liability, not necessary to be alleged or proved to make a case under the federal act (and the facts alleged bringing it within the federal act not being necessary to the cause of action under the common law or state statute), in the state court, the plaintiff may succeed on either one of three theories; that is, he may abandon all pretense that the case is within the federal act and yet succeed. By artful pleading he defeats removal. This question of removal has been up in the following cases: *Van Brimmer v. Texas & P. R. Co.* (C. C.), 190 Fed. 394 (6 N. C. C. A. 79n); *Symonds v. St. Louis & S. E. R. Co.* (C. C.), 192 Fed. 353; *Lee v. Toledo, St. L. & W. R. Co.* (D. C.), 193 Fed. 685; *Hulac v. Chicago & N. W. R. Co.* (D. C.), 194 Fed. 747; *McChesney v. Ill. Cent. R. Co.* (D. C.), 197 Fed. 85; *Ullrich v. New York, N. H. & H. R. Co.* (D. C.), 193 Fed. 768. The *Ullrich* case is nearest in point here, and assumes that three causes of action are pleaded, which under the New York Code seems not to be the case. See later. If, on the trial in the state court, the plaintiff shall abandon the theory that the case arose under the federal act, or shall fail to

4. *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.

5. *Rice v. Boston & M. R. Co.*, 203 Fed. 580.

show a case within that act, and that court has power at once to send the case back to the federal court, the rights of the defendant to removal will be protected and preserved.”

**§ 128. Action Removable When Petition Does Not State Cause of Action Under Federal Act Although Intended to Be Under That Statute.**—An action by an employe against a railroad company, incorporated under the laws of another state, where the other jurisdictional facts appear, is removable to the proper United States district courts when the petition fails to state a cause of action under the Federal Employers’ Liability Act although the plaintiff may have intended to bring his suit under that act.<sup>6</sup> In the Thomas case cited, the plaintiff, a resident of Iowa, brought an action in the Iowa courts against an Illinois railroad company engaged in interstate commerce. The petition was in two counts, one stating a cause of action under the laws of the state and the other attempting to state a cause of action under the Federal Employers’ Liability Act. It was alleged in the last count that the carrier was engaged in interstate commerce and that the deceased employe was employed by it in such commerce at the time of his death. There was, however, no allegation that the decedent left surviving him a widow, child, parent or next of kin for whose benefit a right of action survives under the Federal Employers’ Liability Act. The court held that since the petition therefore did not state a cause of action

6. *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 767, 6 N. C. C. A. 439n, 446n.







under the federal act and since the suit was against a non-resident and for a greater sum than \$3,000, the cause was removable to the federal court. Judge Reed, in overruling the motion to remand, said: "It may be that it was intended to allege in this count of the petition a cause of action arising under the Federal Employers' Liability Act. If so, essential facts are wholly wanting to show such a cause of action; the averment alone that 'the carrier and its employe were engaged in interstate commerce at the time of the injury to and death of the employe' being insufficient to show such a right. If it appeared upon the face of the petition that sufficient facts existed to show a right of action under the federal act, but were inaptly or defectively alleged, such defects could be cured by an amendment, and they might be overlooked. But, when essential facts are wholly wanting, effect must be given to the petition as it is written."

**§ 129. Statute of Limitation.**—It is provided in § 6 of the act that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." This statute of limitation applies to all actions against railroad companies brought by employes for injuries received while employed in interstate commerce and while the carrier was so engaged.<sup>7</sup> The Supreme Court of North Carolina has held that the defendant in an action under the federal act, in order to avail itself

7. *Shannon v. Boston & M. R. Co.*, — N. H. —, 92 Atl. 167.

of the benefit of the statute of limitation under that act must plead it.<sup>8</sup>

**§ 130. Judgment of Highest State Court in Action Under Federal Act May Be Reviewed by United States Supreme Court, When.**—In an action brought under the Federal Employers' Liability Act in the state court where there is a final judgment in the highest court of the state in which a decision in the cause could be had, the Supreme Court of the United States has appellate jurisdiction on a writ of error issued by it to the court of last resort in the state where the validity of the statute is drawn in question and the decision is against its validity; or where the statute is declared valid by the state court but is claimed by one of the parties to the litigation to be contrary or repugnant to the Constitution of the United States; or where the decision of the state court is against any title, right, privilege or immunity specially set up or claimed by either party to the action under the Constitution of the United States or some act of Congress. Such questions may be reexamined by the Supreme Court of the United States on writ of error and the writ has the same effect as if the judgment complained of had been rendered by a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of the state court and may, at its discretion, award execution or remand the same to the court from which it was removed by the writ.<sup>9</sup>

8. *Burnett v. Atlantic C. L. R. Co.*, 163 N. C. 186, 6 N. C. C. A. 103, 104n.

9. Section 237 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156). This code merely re-enacted § 709 R. S. U. S.,





**§ 131. Record Must Show Right Under Federal Laws Was Specially Set Up and Denied by State Court.**—In order to sustain a writ of error from the Supreme Court of the United States to the highest court of a state in any action under the Federal Employers' Liability Act, it must appear, in order to give the United States Supreme Court jurisdiction, that a right under the Constitution or laws of the United States was specially set up by the plaintiff in error in the state court and denied by the highest court of the state. It must also appear from the record that there was necessarily presented in the state court a definite issue as to the correct construction of the Federal Employers' Liability Act so directly involved that the state court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error.<sup>10</sup>

**§ 132. Contention That There Is or Is Not Sufficient Evidence to Show Liability, Will Support Writ of Error.**—If at the close of the evidence in an

4 Fed. Stat. Ann. p. 467; *Seaboard A. L. Ry. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106; *Gaar, S. & Co. v. Shannon*, 223 U. S. 468, 56 L. Ed. 510; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061; *Tilt v. Kelsey*, 207 U. S. 43, 52 L. Ed. 95; *Kansas City S. R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556; *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 52 L. Ed. 143; *Illinois C. R. Co. v. Kentucky*, 218 U. S. 551, 54 L. Ed. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Slade*, 216 U. S. 78, 54 L. Ed. 390; *Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 191, 53 L. Ed. 963; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84n.

10. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061; *Seaboard A. L. Ry. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171; *Moliter v. Wabash R. Co.*, — Mo. App. —, 168 S. W. 250, 6 N. C. C. A. 75n, 81n, 86n, 233n.

action under the Federal Employers' Liability Act, defendant demurs or moves for directed verdict (the particular form of such motion being governed by the local practice) the action of the court thereon, if duly excepted to, raises a federal question which will support a writ of error from the national Supreme Court to the highest state court to which the case may be appealed. If the demurrer is sustained the plaintiff may appeal and raise the federal question whether he has produced evidence tending to show existence of the federal right. If the demurrer is overruled, the defendant may appeal and raise the federal question whether there is any evidence tending to show that the defendant is liable within the terms of the statute.

The question as to whether there is any evidence tending to prove every element necessary to recover under the act, is a federal question if properly raised. Thus in one case the plaintiff failed to prove that a violation of the national Hours of Service Act, on which recovery was based, was the proximate cause of employe's death and because of such failure of proof, the cause was reversed in the national Supreme Court after an affirmance in the highest state court.<sup>11</sup> In the McWhirter case cited, the defendant raised the federal question by requesting the court to instruct the jury to find in its favor. The court refused to do so and the defendant excepted. In deciding that such a question would support a writ of error from the highest state court to which the

11. *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, reversing same case reported in 145 Ky. 427.







case was appealable, to the United States Supreme Court, Mr. Justice White said: "While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat., § 709, yet where, in a controversy of a purely federal character, the claim is made and denied that there was no evidence tending to show liability under the federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the federal law."<sup>12</sup>

**§ 133. Power to Review Does Not Extend to Questions Merely Incidental and Non-Federal in Character.**—Under the act of Congress heretofore cited giving the Supreme Court of the United States the power to review judgments of the highest court of a state to which a case is appealable, in any action under the Federal Employers' Liability Act, the power of the United States Supreme Court does not extend to questions merely incidental and not federal in their character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the federal statute to which his recourse by the pleadings was confined or the converse, that is, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part would result.<sup>13</sup>

**12.** The court in reaching this conclusion cited the following cases: *Kansas City S. R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 591, 56 L. Ed. 556, 565; *Creswill v. Grand Lodge, K. P.*, 225 U. S. 246, 56 L. Ed. 1074.

**13.** *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 6 N. C. C. A. 224, affirming same case reported in 180 Ill. App. 511; *St.*

**§ 134. Ruling of State Court That Federal Question Was Sufficiently Raised Binding Upon United States Supreme Court.**—To support a writ of error to the United States Supreme Court, the federal statute requires that the right, title, privilege or immunity shall be “especially set up or claimed” by the party appealing. If the highest supreme court of a state holds that a federal question was sufficiently raised and decided it, the objection that the claim or right was not presented with clearness enough to save it, is not open in the United States Supreme Court.<sup>14</sup> In the Hesterly case cited, which was an action under the Federal Employers’ Liability Act, the administrator of a deceased employe was seeking to recover damages for the pain and suffering of the deceased, the death having occurred prior to the 1910 amendment. The defendant requested the trial court for a ruling that the plaintiff could not recover such damages which request was denied and defendant excepted. On appeal to the state supreme court, that court treated the request as intended to raise the question whether the federal act displaced the state law and whether such damages could be recovered under it. The ruling of the lower court was sustained. When the case reached the national Supreme Court on writ of error, the defend-

Louis, I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179, reversing 145 Ky. 427; Seaboard A. L. R. Co. v. Duvall, 225 U. S. 447, 56 L. Ed. 1171; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061.

14. St. Louis, I. M. & S. Ry. Co. v. Hesterly, 228 U. S. 702, 57 L. Ed. 1031, reversing same case reported in 98 Ark. 240; San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S. 177, 180, 47 L. Ed. 765, 768; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. Ed. 596.





ant in error made the objection that the claim or right under the laws of the United States was not raised with sufficient clearness to save the point; but the United States Supreme Court held that since the state supreme court had held the question sufficiently raised and passed upon it, such objection was not open in the national Supreme Court.

**§ 135. Federal Questions to Support Writ of Error to United States Supreme Court, Need Not Be Raised by the Pleadings.**—The federal claim or right which will support a writ of error from the United States to the highest court of a state, need not be raised by the party appealing by the pleadings. Where an interstate railroad was sued in the state court under a state statute for the death of an employe by beneficiaries in their individual capacities, and the defendant, not by answer, but by appropriate special exceptions, asked that the plaintiff be required to state facts showing whether they were relying on the state or federal act, which request was refused, and again at the conclusion of the testimony, defendant requested the court to direct the verdict in its favor on the ground that the undisputed evidence disclosed that the case was one which the federal statute controlled and that if liable, it was liable to the personal representatives and not to the plaintiffs, which request was denied, and the jury returned a verdict for the plaintiffs in which the damages were apportioned among the parents and widow conformable to state law, the national Supreme Court held that the federal question was interposed in due time, and that the state courts erred in overruling it, thus



supporting a writ of error from the national Supreme Court to the state supreme court.<sup>15</sup> It will be noticed that the federal right was not set up in the answer nor did the petition present any issue for the construction of the act, but the court held that in view of the fact that the plaintiffs' evidence showed conclusively that the deceased was engaged in interstate commerce, it was sufficiently raised by a demurrer, especially since the court overruled the motion to make the petition state the facts as to employment in either kind of commerce.

**§ 136. Pleading Federal Act and Submitting Case to Jury Under State Law, No Denial of Federal Right.**—In an action under the federal act where a petition stated a good cause of action under that law and eliminating the allegations as to interstate employment, stated a good cause of action under the law of the state, and the defendant upon the conclusion of all the evidence requested the court to instruct the jury that the case could not be maintained under the federal act and the lower court sustained its contention and submitted the cause under the state law, no right under the federal law by the action of the state court was denied the defendant and hence a writ of error to the United States Supreme Court could not be maintained.<sup>16</sup>

15. *Seale v. St. Louis, S. F. & T. R. Co.*, 229 U. S. 156, 57 L. Ed. 1129, Ann. Cas. 1914 C 156n, reversing the same case reported in — Tex. Civ. App. —, 148 S. W. 1099; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 6 N. C. C. A. 75n, 78n, 81n, 86n, 233n.

16. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 6 N. C. C. A. 224, affirming same case reported in 180 Ill. App. 511.







**§ 137. When Petition Not Stating a Good Cause of Action Under Federal Act Raises a Federal Question.**—In an action by the administrator of a deceased railroad employe against a railroad company it was neither pleaded nor proven that the deceased left a widow, child, parent or dependent next of kin surviving him which is jurisdictional to a recovery under the federal act. Defendant in its answer set up that it was engaged in interstate commerce and that the deceased servant was employed by it in such commerce at the time of his death. The trial court overruled the contention of the defendant that the federal law applied and submitted the cause under the state law. The Supreme Court of the United States held that such a question was sufficient to support a writ of error for the reason that under the state law this limitation upon the recovery by an administrator was not recognized.<sup>17</sup>

**138. Claim That Verdict Is Excessive Not Reviewable by Writ of Error.**—A contention that a verdict in an action under the federal act is excessive does not present a question for reexamination upon a writ of error in the Supreme Court of the United States. Such questions are matters to be dealt with by the state courts.<sup>18</sup>

17. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n.

18. *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 58 L. Ed. 860.

## CHAPTER X

### PARTIES, PLAINTIFFS AND DEFENDANTS, IN SUITS UNDER FEDERAL ACT

- § 139 Personal Representative Only Can Bring Suit in Case of Death.
- § 140. Widow Cannot Maintain Suit in Individual Capacity Although She May Be Sole Beneficiary.
- § 141. Want of Legal Capacity in Widow to Sue Cannot Be Waived.
- § 142. Ancillary Administrator May Sue Under the Federal Act.
- § 143. Personal Representative Alone May Revive Suit Commenced by Employe in His Lifetime.
- § 144. Existence of Other Property Not Necessary to Secure Appointment of Personal Representative.
- § 145. Agents and Servants Whose Negligence Caused Injury, Not Liable Under the Federal Act.
- § 146. Lessor of a Railroad May Be Made Party Defendant.
- § 147. Personal Representative Appointed in One State Cannot Sue in Another State Without Consent.

**§ 139. Personal Representative Only Can Bring Suit in Case of Death.**—The federal statute provides in the first section that the carrier shall be liable in damages to any employe suffering injury under the condition named in the act, or, “in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe’s parents; and, if none, then of the next of kin dependent upon such employe.” The amendment of 1910 also provides that “any right of action given by this act to a person suffering injury, shall survive to his or her personal representative,





for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury." In cases of death, therefore, it has been repeatedly held by the courts that suit under the federal act can only be brought by the personal representative of the deceased, that is, the administrator or the executor as the case may be.<sup>1</sup>

**§ 140. Widow Cannot Maintain Suit in Individual Capacity Although She May Be Sole Beneficiary.**—If at the time of the accident, the railroad company was engaged in interstate commerce and the servant was employed by it in such commerce, the remedy given by the federal act is exclusive and the widow cannot sustain a suit in her individual capacity, although she is the sole beneficiary and although the laws of the state where the accident occurred, provide that the widow is the proper party to bring suit for the death of an employe.<sup>2</sup> Prior to the decisions of the

1. *American R. Co. v. Didricksen*, 227 U. S. 147, 57 L. Ed. 456; 3 N. C. C. A. 809n, 831n; *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 6 N. C. C. A. 230n, 237n, Ann. Cas. 1914 B 134n; *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879; *St. Louis, S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n; *St. Louis, I. M. & S. Ry. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379; *Gulf, etc., R. Co. v. Lester*, — Tex. Civ. App. —, 149 S. W. 841; *Dewberry v. Southern R. Co.*, 175 Fed. 307; *Hearst v. St. Louis, I. M. & S. Ry. Co.*, — Mo. App. —, 173 S. W. 86.

2. *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879; *Eastern Ry. Co. of New Mexico v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701; *Dewberry v. Southern R. Co.*, 175 Fed. 307; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379; *St. Louis S. W. Ry. Co. v. Brothers*, — Tex.



Supreme Court of the United States cited, a few courts had decided that a widow, under such circumstances, was not limited to sue under the Federal Employers' Liability Act, but was also entitled to sue under the state law.<sup>3</sup> These decisions are now in conflict with the controlling rulings of the national Supreme Court.

**§ 141. Want of Legal Capacity in Widow to Sue Cannot Be Waived.**—The want of legal capacity in a widow to sue as an individual under the federal statute, goes to the substance of the action and cannot be waived.<sup>4</sup> Where a widow, suing individually as plaintiff in a Missouri court, and alleging a cause of action under the laws of the state of Kansas, obtained a judgment upon proof showing that her husband was killed while assisting in the movement of an interstate train, she could not thereafter as administratrix, enter her appearance and adopt the judgment.<sup>5</sup> In the Vaughan case, cited in the notes, it was argued on behalf of the widow that the federal statute did not control procedure in the state courts and that as the defendant did not demur or raise the objection by answer, it waived the lack of capacity in plaintiff to sue. But Judge Trimble, speaking

Civ. App. —, 165 S. W. 488; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 6 N. C. C. A. 75n, 438n, 439n; *Cincinnati, N. O. & T. P. Ry. Co. v. Bonham*, — Tenn. —, 171 S. W. 71.

3. An illustrative case is *Troxell v. Delaware, L. & W. R. Co.*, 180 Fed. 871. This case was reversed when it reached the Circuit Court of Appeals, 183 Fed. 373.

4. *Missouri, K. & T. Ry. Co. v. Lenahan*, 39 Okla. 283, 6 N. C. C. A. 75n, 78n, 437n.

5. *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 6 N. C. C. A. 75n, 438, 439n; *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 6 N. C. C. A. 438, 439n.





for the court, in answering this contention, said: "The trouble with this contention is that since the federal act displaces the Kansas statute it has taken out of the widow the right to recover and placed it in the personal representative, and when defendant by its demurrer to the evidence objected to any judgment, there was no law in force authorizing the court to render judgment in her favor. The court had no authority, outside of the federal law, to render any judgment. Hence it had no authority to render the judgment it gave, and, as defendant objected thereto, by demurring to the evidence, the validity thereof was not waived. (See on this point *Barker v. Hannibal & St. J. R. Co.*, 91 Mo. 86; *Hegberg v. St. Louis & S. F. R. Co.*, 164 Mo. App. 514; *Poor v. Watson*, 92 Mo. App. 89.) Again, while the federal act does not attempt to control state procedure, yet it does not leave state procedure so free and untrammelled as to allow such procedure to work a change in the terms of the statute. So that as defendant objected to the judgment before it was rendered the provisions of the federal law were not waived." Other courts have held that if the pleading states facts showing that the remedy given by the federal act applies, or the evidence discloses that the decedent was killed while employed in interstate commerce, the want of the widow's legal capacity to sue may be raised for the first time in the appellate court.<sup>6</sup>

6. *Cincinnati, N. O. & T. P. Ry. Co. v. Bonham*, — Tenn. —, 171 S. W. 71; *La Casse v. New Orleans, T. & M. R. Co.*, — La. —, 6 N. C. C. A. 196n, 437n, 64 So. 1012; *Southern Ry. Co. v. Howerton*, — Ind. —, 101 N. E. 121; *St. Louis, I. M. & S. R. Co. v. Hesterly*,

§ 142. **Ancillary Administrator May Sue Under the Federal Act.**—A deceased brakeman at the time of his death, was in the employ of a railroad company running between a point in Tennessee and another point in Kentucky. He lived in Kentucky and the railroad company was a corporation of Kentucky. He was killed in Tennessee. His widow was appointed administratrix of his estate by the proper court of the county in which he lived in Kentucky. Afterwards, upon proof that he had some property, an administrator was appointed in the county in Tennessee in which he was killed. Anderson, the Tennessee administrator, brought suit under the federal act against the railroad company in the state courts of Tennessee which, prior to the 1910 amendment as to removal, was removed to the District Court of the United States including that county. The pleading of the defendant set out these facts and the lower federal court dismissed the suit on the ground that the cause of action vested solely in the administratrix appointed in Kentucky. In the Circuit Court of Appeals the sole question before the court was whether, notwithstanding the previous appointment of the Kentucky administratrix, the Tennessee administrator, could, for the purposes of the suit, be rightfully treated as the decedent's "personal representative" within the meaning of the Federal Employers' Liability Act. The court held that the federal statute did not vest the right of action solely in the administrator appointed in the







state of the deceased employe's domicile, but that the action might be maintained by an ancillary administrator appointed in another state in view of the remedial character of the statute and the representative character of the suit authorized, especially where the ancillary administrator is appointed in the state where the death occurred, and the suit is brought and prosecuted with the approval of the domiciliary administratrix who is also the principal beneficiary.<sup>7</sup>

**§ 143. Personal Representative Alone May Revive Suit Commenced by Employe in His Lifetime.—**

Prior to the amendment of 1910, it had been held by the courts that the cause of action given an employe by the federal statute did not survive his death, but was extinguished by his death.<sup>8</sup> These decisions led Congress to pass the amendment providing for the survival of the cause of action. Notwithstanding, the amendment provides that the damages shall go to the same beneficiaries mentioned in the first section of the act the personal representative is the only proper party plaintiff to revive and prosecute the suit in the event of the death of the employe after bringing a suit for his own injuries.<sup>9</sup>

**§ 144. Existence of Other Property Not Necessary to Secure Appointment of Personal Representative.**

—Although an employe of a common carrier by rail-

7. *Anderson v. Louisville & N. R. Co.*, 127 C. C. A. 277, 210 Fed. 689, 6 N. C. C. A. 439n.

8. *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494; *Fulgham v. Midland V. R. Co.*, 167 Fed. 660.

9. *St. Louis S. W. R. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

road, killed under circumstances rendering the federal act exclusively applicable, left no other property except the right of action for the beneficiaries under the national statute, letters of administration on his estate may nevertheless be issued.<sup>10</sup>

**§ 145. Agents and Servants Whose Negligence Caused Injury, Not Liable Under the Federal Act.—**

The agents or servants whose negligence cause an injury to another employe employed by the carrier at the time of the injury, in interstate commerce, are not liable under the federal statute. In one case the administrator of an engineer's estate brought suit against a railroad company and alleged facts which showed that the federal act was applicable. A master mechanic, whose negligence was claimed to have caused the injury, was joined as defendant. The court held that the master mechanic was not liable under the Federal Employers' Liability Act, for the law is limited to common carriers engaged in interstate commerce and the master mechanic was not a common carrier engaged in interstate commerce. It was held however that if his negligence caused the injury, he would be liable under the state laws to the proper party suing under that law.<sup>11</sup>

**§ 146. Lessor of a Railroad May Be Made Party Defendant.—**When a railroad company leases its line to another company and the laws of the state provide that the lessor shall be liable for the acts of the lessee, the lessor may be sued for an injury oc-

10. *Gulf, C. & S. F. Ry. Co. v. Biezley*, — Tex. Civ. App. —, 153 S. W. 651; *Eastern Ry. Co. of New Mexico v. Ellis*, — Tex. Civ. App. —, 153 S. W. 701.

11. *Kelly v. Chesapeake & O. R. Co.*, 201 Fed. 602.





curing in that state under conditions described in the federal act although the injured servant was in the employ of the lessee.<sup>12</sup> But the Supreme Court of Illinois held that the owner of the track was not liable under the federal act to an employe of a licensee on the same track, the licensee and its employe being at the time engaged in interstate commerce.<sup>13</sup>

**§ 147. Personal Representative Appointed in One State Cannot Sue in Another State Without Consent.**—The personal representative of a deceased railroad employe killed while working for a railroad company in interstate commerce and while the company was so engaged, cannot prosecute an action for his death in any state besides the one in which he was appointed, unless he is authorized to do so by a statute of the state where he proposes to bring the action.<sup>14</sup>

12. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n.

13. *Wagner v. Chicago & A. R. Co.*, — Ill. —, 106 N. E. 809.

14. *Baltimore & O. R. Co. v. Evans*, 110 C. C. A. 156, 188 Fed. 6; *Midland V. R. Co. v. LeMoyne*, — Ark. —, 4 N. C. C. A. 493n, 148 S. W. 654; *Hall v. Southern R. Co.*, 146 N. C. 345.

## CHAPTER XI

### PLEADINGS UNDER THE FEDERAL ACT

- § 148. Plaintiff's Petition Must Plead Facts Showing That Injury or Death Occurred Under Conditions Described in the Act.
- § 149. If petition States Cause of Action Solely Under Federal Law, There Can Be No Recovery Under State Law—Conflicting Rulings.
- § 150. Petition Stating a Cause of Action Under State Law, Recovery Permitted Under Federal Act When Omitted Allegations Are Supplied by the Answer.
- § 151. Recovery Under Petition Stating Cause of Action Under State Law Though Evidence Shows a Case Under Federal Act, Harmless Error on Appeal, When.
- § 152. Pleading Cause of Action Under State Law in One Count and Under Federal Act in Another Count, Allowed.
- § 153. Petition Need Not Specifically Refer to the Act if Facts Showing Liability Thereunder Are Pleaded.
- § 154. State Law as to Sufficiency of Pleading Governs.
- § 155. Allegations as to Engagement in Interstate Commerce Held Sufficient.
- § 156. Allegation to Show Cause of Action Under the Federal Act Held Not Sufficient.
- § 157. In Cases of Death Petition Must Allege Survival of Beneficiaries Named in Statute.
- § 158. Petition Must Allege Pecuniary Loss to Beneficiaries.
- § 159. In Suits Under State Laws, Applicability of Federal Act May Be Raised by Answer.
- § 160. Where Petition Is Under State Law and Evidence Shows Case Under Federal Statute, Plaintiff Cannot Recover.
- § 161. Defendant in Suit Under State Law Must Specifically Plead Federal Act to Defeat Recovery.
- § 162. When Amendment of Petition Permissible After Two-year Period of Limitation.
- § 163. When Amendments After Limitation Period Not Allowed.

**§ 148. Plaintiff's Petition Must Plead Facts Showing That Injury or Death Occurred Under Conditions Described in Federal Act.—In order to recover**







in an action based upon the Federal Employers' Liability Act, the plaintiff should allege facts showing that at the time of the accident the defendant was engaged as a common carrier by railroad in interstate commerce and that the plaintiff (or the decedent) was employed by the defendant in such commerce at the same time.<sup>1</sup> If the plaintiff's petition states a cause of action under the state law, no recovery can be had under the federal act, notwithstanding the evidence shows that the plaintiff's rights are governed by that statute.<sup>2</sup> One of the Missouri courts of appeal decided that it was not

1. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A., 194n, Ann. Cas. 1914 C 159n; St. Louis, S. F. & T. Ry. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n; Shade v. Northern P. Ry. Co., 206 Fed. 353, 6 N. C. C. A. 93n; Southern Ry. Co. v. Howerton, — Ind. —, 106 N. E. 369; Chicago, R. I. & P. Ry. Co. v. McBee, — Okla. —, 145 Pac. 331.

Concerning the necessity of pleading facts showing that the suit is brought under the Federal Employers' Liability Act, the Supreme Court of Alabama in reversing the case of Atlantic C. L. Ry. Co. v. Jones, 9 Ala. App. 499, said: "It is essential to the certain and orderly administration of the law of master and servant, as these distinct enactments establish it, that the initial pleading, or its amendment, be so drawn that the courts may be able to determine under which of the two enactments, state or federal, the respective counts are intended to assert a claim for liability. The sufficiency *vel non* of counts under our state statute necessarily involve questions that will not arise upon the issue of sufficiency *vel non* of counts seeking to declare upon a liability under the federal statute; and the provisions of the latter enactment forbid matters of defense admissible in an action under the state statute." Ex Parte Atlantic C. L. R. Co., — Ala. —, 67 So. 256.

2. Gaines v. Detroit, G. H. & M. C. Ry. Co., — Mich. —, 6 N. C. C. A. 202n, 148 N. W. 397; Moliter v. Wabash R. Co., — Mo. App. —, 6 N. C. C. A. 75n, 78n, 81n, 186n, 233n, 168 S. W. 250; Rich v. St. Louis & S. F. R. Co., 166 Mo. App. 379; Penny v. New Orleans G. N. Ry. Co., — La. —, 66 So. 313; Midland V. R. Co. v. Ennis, — Ark. —, 6 N. C. C. A. 80n, 234n, 159 S. W. 215.

necessary in a petition to recover under the federal act to allege that the railroad company was engaged in interstate commerce as the court will take judicial notice that all railroads in the state are engaged in interstate commerce,<sup>3</sup> but this decision lays down a rule that is contrary to the weight of authority.<sup>4</sup>

A petition charging negligence under the original Safety Appliance Act was held to state no cause of action for the reason that there was no allegation in the petition that the cars having the defective couplers were at the time of the injury being used in interstate commerce.<sup>5</sup> A petition which does not state that the defendant was a common carrier is defective.<sup>6</sup>

3. *McIntosh v. St. Louis & S. F. R. Co.*, — Mo. App. —, 168 S. W. 821.

4. *Moliter v. Wabash R. Co.*, — Mo. App. —, 168 S. W. 250; *Chicago, R. I. & P. Ry. Co. v. McBee*, — Okla. —, 145 Pac. 331; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n; *Atlantic C. L. R. Co. v. Reaves*, 125 C. C. A. 599, 208 Fed. 141; *Seaboard A. L. Ry. Co. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171; *Fort Worth & D. C. Ry. Co. v. Staleup*, — Tex. —, 167 S. W. 279. The Supreme Court of Michigan held that it was not necessary for the plaintiff in any action for personal injuries against a common carrier or railroad to "plead either statute (state or federal) but that upon the coming in of the proofs, it was the duty of the trial court to permit an amendment of the pleadings to conform thereto." Under this decision the defendant is not entitled to notice by the pleadings, before the trial, as to which law, state or federal, the plaintiff is relying upon. *Fernette v. Pere Marquette R. Co.*, — Mich. —, 6 N. C. C. A. 231n, 144 N. W. 834; *contra*, *Gaines v. Detroit, G. H. & M. Ry. Co.*, — Mich. —, 6 N. C. C. A. 202n, 148 N. W. 397.

5. *Brinkmeier v. Missouri P. Ry. Co.*, 224 U. S. 268, 56 L. Ed. 758, 3 N. C. C. A. 795n, affirming same case reported in 81 Kan. 101.

6. *Shade v. Missouri P. R. Co.*, 206 Fed. 353, 6 N. C. C. A. 93n.





§ 149. If Petition States Cause of Action Solely Under Federal Law, There Can Be No Recovery Under State Law—Contrary Rulings.—In any action by an employe against a railroad company for injuries, if the petition states facts which constitute a cause of action *solely* under the federal act, and it develops at the close of the evidence, the plaintiff was not engaged in interstate commerce, the cause should not be submitted to the jury under the laws of the state, although after eliminating the allegations as to interstate employment, the petition states facts sufficient to constitute a cause of action under the state law.<sup>7</sup> This rule, however, does not apply when the petition states a cause of action under the state law in one count and under the federal law in another count.<sup>8</sup>

The Kentucky Court of Appeals, however, held that even under a petition stating a cause of action solely under the federal act, the cause should be, under the conditions stated, submitted under the state law.<sup>9</sup> It is impossible to harmonize this ruling with the cases previously cited herein and also with the cases cited in the preceding paragraph, holding that under a petition stating a cause of action under the state law, a recovery cannot be had under the federal act; for whatever is the true rule, it ought

7. *Midland V. R. Co. v. Ennis*, 109 Ark. 206, 6 N. C. C. A. 80n, 234n; *Moliter v. Wabash R. Co.*, — Mo. App. —, 6 N. C. C. A. 75n, 78n, 81n, 186n, 233n, 168 S. W. 250; *Gaines v. Detroit, G. H. & N. Ry. Co.*, — Mich. —, 6 N. C. C. A. 202n, 148 N. W. 397; *Creteau v. Chicago & N. W. Ry. Co.*, 113 Minn. 418.

8. Section 152, *infra*; *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.

9. *Jones v. Chesapeake & O. Ry. Co.*, 149 Ky. 566.

to work both ways and there can be no difference in principle between cases holding that the petition must allege a cause of action under it, if a recovery is sought under the federal act and a case in which the plaintiff is seeking a recovery under the state law when his petition declares a cause of action under the federal act. In deciding the Jones case, cited in the notes, the Kentucky Court of Appeals, upon the question under discussion, cited a case decided by a federal district court as approving such a practice;<sup>10</sup> but in that case, the question was not passed upon, the controversy being as to the removability of a cause under the federal act, which also stated a cause of action under the state law.

To permit a plaintiff to allege a cause of action under the federal act and then after all the evidence is in, if it appears that he was not engaged in interstate commerce, to submit the case under the state law, might work an injustice upon the defendant; for there are defenses to actions under state laws, which he might have set up in his answer, and which he would not, in an action under the federal act. In such a case as the petition only stated a cause of action under the federal act, a defendant could scarcely be expected to anticipate that the plaintiff, at the close of the evidence, would switch from law to law so as to make it obligatory upon the defendant to set up defenses to a law not pleaded, or relied upon in the petition. The converse of this rule has properly been applied to the defendant in an action under the federal act, for it has been repeatedly de-

10. *Ullrich v. New York, N. H. & H. R. Co.*, 193 Fed. 768.







cided that a defendant cannot defeat the plaintiff's right to recover under a state law, by claiming that he was engaged in interstate commerce at the time, unless such a defense is pleaded in the answer.<sup>11</sup> If such a defense is to be made, the plaintiff should have notice of it, so that he may take such action as may be necessary to protect his interest. On the other hand, if a plaintiff expects to recover under a state law, he should be required to plead it in his petition so that the defendant may not be taken by surprise. In passing upon the question under discussion, the language of the Supreme Court of Arkansas in *Midland V. Ry. Co. v. Ennis*, cited *supra*, states the rule that should be applied in such cases, as follows: "It is insisted now that, appellee having sued under the Employers' Liability Act, he cannot recover in this action under the laws of the State of Oklahoma for an injury which occurred while the deceased was engaged in intrastate commerce. Facts which give the right to recover under the state law, and those which give the right to recover under the federal statute, constitute separate and distinct causes of action, for the federal statute is exclusive where the incident is embraced within interstate commerce service and does not apply where it is in intrastate service. The two causes of action may, however, be joined in the same complaint. Kirby's Digest, § 6079, subd. 6. There cannot, however, be a recovery upon a cause of action other than that stated in the pleadings and upon which the issue is

11. Section 160, *infra*. If the plaintiff's proof shows a cause of action under the federal, then there is a variance. Section 160, *infra*.

joined. *Patrick v. Whitley*, 75 Ark. 465, 85 S. W. 1179, 5 Ann. Cas. 672; *St. Louis, S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129 (3 N. C. C. A. 800, Ann. Cas. 1914 C 156n).''

**§ 150. Petition Stating a Cause of Action Under State Law, Recovery Permitted Under Federal Act When Omitted Allegations Are Supplied by the Answer.**—Even though a petition for damages by an employe against a railroad company is silent as to the allegations necessary to constitute a cause of action under the federal act, i. e., engagement of the one and employment of the other by it in interstate commerce at the time of the injury, yet nevertheless at least two appellate courts have sustained on appeal a recovery upon such a petition without amendment, under the federal act, under the following circumstances: When the defendant's answer alleged it was engaged and the injured servant was employed, in interstate commerce at the time of the injury and the plaintiff admitted such allegations in his reply, a recovery under the federal act was sustained on appeal because the allegations necessary to state a good cause of action under the federal act were supplied by the defendant's answer, and under the doctrine of *aider*, the defect in the petition was cured by the answer.<sup>12</sup> The courts in the opinions

12. *Vickery v. New London N. R. Co.*, 87 Conn. 634, 4 N. C. C. A. 218n, 6 N. C. C. A. 75n, 93n, 230n; *White v. Central V. Ry. Co.*, 87 Vt. 330, 6 N. C. C. A. 75n, 92n, 101n, 450n; *Niles v. Central V. Ry. Co.*, 87 Vt. 356, 6 N. C. C. A. 75n.

A verdict against a railroad company for the death of a car repairer engaged in interstate commerce, was sustained by the Supreme Court of Arkansas although the complaint did not expressly declare under the federal statute. The decedent was repairing a





cited tacitly recognized the general rule that a recovery under the federal act would not be permitted under a petition stating a cause of action under the laws of the state and also specifically held that the rule of express *aider* in pleadings does not go to the extent of curing a petition which states no cause of action; but held such petitions, being silent as to the employment of one and the engagement of the other in interstate commerce, merely stated a defective cause of action under the federal act. To the extent of holding that a petition for damages under the laws of a state, states also a cause of action under the federal act although defective, the cases cited in this paragraph seem to conflict with the rulings by other courts cited elsewhere.<sup>13</sup> The plaintiff in the Vickery case cited, had been placed in a predicament endangering his right to recover by a former opinion of the same court, and his failure to keep alive his cause of action under the federal act was due to the court's own error in a former opinion in another case subsequently reversed by the Supreme Court of the United States.<sup>14</sup> In the former opinion

car in Arkansas consigned from Kansas City, Missouri, to Tuckerman, Arkansas. The court said: "The plaintiff does not, in her complaint, expressly declare upon the federal statute known as the 'Federal Employers' Liability Act.' Nor does the complaint even contain an allegation that Sharp was engaged in work on a car used in interstate commerce; but that fact is set forth in the answer and the case was tried under the terms of that statute. The rights of the parties must therefore be determined by the terms of the federal statute," *St. Louis, I. M. & S. Ry. Co. v. Sharp*, — Ark. —, 171 S. W. 95.

13. Sections 148 and 149, *supra*.

14. Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44.



in the other case the court had declared the Employers' Liability Act of 1908 invalid as being in conflict with the Constitution of the United States. The plaintiff in the Vickery case, relying upon this opinion, brought his action against the railroad company under the state law. It was conceded that he was engaged in interstate commerce. After the two-year period of limitation under the federal act had expired, the United States Supreme Court in the Mondou case held that the federal act was valid.<sup>15</sup> The plaintiff then sought to amend his petition by alleging that the defendant was engaged and that he was employed in interstate commerce at the time of the injury. The trial court refused to permit an amendment on the ground that the cause of action under the federal act had expired. Afterwards the defendant filed an amended answer alleging the engagement of the company and the employment of the plaintiff in interstate commerce at the time of the injury. The plaintiff then filed a reply, admitting these allegations of the amended answer and concluded his reply with a prayer for recovery under the federal act. To this reply the defendant demurred because, among other things, it was a departure from the original petition. The trial court overruled the demurrer and the defendant, refusing to stand on the demurrer, proceeded to trial. On the issues thus framed by the pleadings a trial was had with the usual result—a verdict by the jury against the railroad company. In the appellate

15. Section 4, *supra*.





court the case therefore turned upon questions of pleading and the court held, (a) that the plaintiff's petition stated a cause of action defectively under the federal act as distinguished from a defective cause of action, (b) that the answer supplied the defective allegations of the petition, (c) that a petition which states no cause of action cannot be aided by allegations in an answer, (d) that a petition which states a cause of action defectively under the federal act may be aided by allegations in the answer although filed after the two-year period of limitation, and (e) that defendant's demurrer to the reply on the ground of departure was under the rules of pleading in that state, waived by going to trial. In the other case by the same court, *Niles v. Central V. Ry. Co.*, cited *supra*, it was held by the court that when a petition stated a cause of action under the state law and the plaintiff sought in his reply to allege facts showing liability under the federal act, such matter constituted a departure.

**§ 151. Recovery Under Petition Stating Cause of Action Under State Law Though Evidence Shows a Case Under Federal Act, Harmless Error on Appeal, When.**—Notwithstanding that, in an action by an employe against a railroad company, the evidence disclosed that the carrier was engaged and the injured servant was employed in interstate commerce, but the petition was based upon the state law and a recovery was permitted by the trial court under the state law, yet such an error will not work a reversal on appeal, unless the defendant has been prejudiced

thereby.<sup>16</sup> For instance, it has been held that, if the federal law was more favorable to the defendant than the state law, it would not be a reversible error for the appellate court to let a recovery under the state law stand even though the evidence disclosed a case under the federal law, the error in such a case not being material and prejudicial.<sup>17</sup> In another case, where under similar circumstances, defendant availed himself during the trial, of all the defenses that he would have had under the federal law, it was held that the trial court, in permitting a recovery under the state law, did not commit such an error as would require a reversal because it did not appear that the defendant had in any way been prejudiced.<sup>18</sup> Courts are not inclined to listen with patience to defenses as to which law is applicable when the claim is made or denied as the exigencies of the situation may be advantageous to the defendant that the plaintiff and the defendant were engaged in interstate commerce if it appears from all the facts

16. *Fernette v. Pere Marquette R. Co.*, — Mich. —, 6 N. C. C. A. 231n, 144 N. W. 834.

17. *McIntosh v. St. Louis & S. F. R. Co.*, — Mo. App. —, 168 S. W. 821.

18. *Southern Ry. Co. v. Howerton*, — Ind. —, 101 N. E. 121; s. c., — Ind. —, 6 N. C. C. A. 75n, 82n, 105 N. E. 1025. In an action by an employe against a common carrier by railroad for injuries, the petition stated a cause of action under the common law. Defendant pleaded in its answer that the plaintiff had accepted benefits from a relief fund, thus releasing the defendant. Plaintiff in his reply pleaded the federal statute abolishing such defenses (See § 121, *infra*) and proved facts showing federal statute applied. Defendant at the trial admitted plaintiff was employed in interstate commerce. It was held that the cause should have been submitted to the jury under the federal act as the defendant was not prejudiced thereby. *Hogarty v. Philadelphia & R. R. Co.*, 245 Pa. 443.







in the case that such defenses are made purely for delay and where they do not affect the substantial rights of the parties.<sup>19</sup> In the Nelson case his original complaint stated a cause of action under both the federal and the state law. The defendant in answering admitting that the plaintiff was injured, but denied that either the plaintiff or the defendant was engaged in interstate commerce at the time of the accident and injury. A further defense of contributory negligence and assumption of risk was pleaded. After the jury was empanelled and sworn, the counsel for defendant admitted that the defendant was liable for the injury to plaintiff unless the latter assumed the risk of the injury or was guilty of contributory negligence. Thereupon, before any evidence was introduced, the plaintiff immediately moved to amend his petition by striking out the allegation that he and the defendant were engaged in interstate commerce so that the complaint stated a cause of action under the state law. Although the defendant had denied in its answer that either of the parties were engaged in interstate commerce, defendant's counsel objected to the amendment. Counsel for plaintiff then offered to admit that both parties were engaged in interstate commerce if counsel for defendant wished to allege that fact. The offer was not accepted and the court granted the plaintiff's motion to amend its petition which after the amendment stated only a cause of action under the state law. After the plaintiff's amendment was made defendant's counsel amended his answer by

19. *Illinois C. R. Co. v. Nelson* (C. C. A.), 212 Fed. 69.

alleging that the defendant was engaged in interstate commerce at the time of plaintiff's injury but did not allege that the plaintiff was also employed in such commerce at the same time. In the course of the trial evidence was introduced which tended to prove that each of the parties was engaged in interstate commerce. No substantial evidence was introduced in support of the defense of assumption of risk or contributory negligence. At the close of all the evidence the plaintiff moved to strike out the evidence that the parties were engaged in interstate commerce at the time of the accident, on the ground that the answer did not set up that defense. Counsel for defendant moved to amend the answer so as to plead that defense but his motion was denied and the motion of the plaintiff to strike out the evidence was granted. The federal circuit court of appeals in considering this case on appeal held that in view of the fact that the negligence was admitted and that no evidence of assumption of risk or contributory negligence was introduced by defendant, that the errors of the court did not prejudice the defendant. Speaking of these gymnastic gyrations of a litigant in a court of justice Judge Sanborn, for the court, said: "No error is perceived in these rulings. The defendant was offered its choice of the defense of a cause of action for an admitted liability under the federal law or under the state law. When the plaintiff alleged that his cause of action arose under the federal law, the defendant denied that it arose under that law. When the plaintiff alleged by an amendment that his cause of action arose under the state





law, counsel for the defendant now insists that he intended to amend his answer so as to plead that it arose under the federal law. The court held that his amended pleading was insufficient to present that issue, and that ruling was clearly right, for it was indispensable to a plea of that fact that the defendant should aver that the plaintiff and his employer were each engaged in interstate commerce at the time of the accident, and the defendant did not allege that the plaintiff was so engaged. There was no error in the granting of the motion to strike out the evidence to the effect that the parties were engaged in interstate commerce because there was no pleading to warrant its admission and it was no abuse of discretion for the court to refuse the defendant permission, at the close of the trial, to inject that issue into the case when the record conclusively proved that the only purpose of the attempt to introduce it was to postpone the plaintiff's recovery of damages caused by the admitted negligence of the defendant. Not only this, but if there had been error in these rulings it would not have been fatal to this trial, because defendant's liability for its negligence was admitted, there was no substantial evidence of the plaintiff's assumption of the risk of his injury, or of his contributory negligence, the same person, the plaintiff, was entitled to recover whether his cause of action arose under the federal law or under the state law, the only question remaining at issue was the amount of the recoverable damages, and the rules for the measurement of these damages were identical under the federal law and under the state law, so

that it appeared beyond doubt from the pleadings and the evidence that an error in these rulings did not prejudice and could not have prejudiced the defendant, and error without prejudice is no ground for reversal. Where, in an action against a common carrier for a negligent injury, the same party, if any one, is entitled to recover on the alleged cause of action, and the rules of law governing the trial of the issues in the case are the same under the Federal Employers' Liability Act and under the state laws, and no question of jurisdiction is involved, it is immaterial whether the action, trial, and judgment are had under the federal law or under the state law. Because there was no substantial evidence to sustain a verdict that the plaintiff assumed the risk of his injury or that he was guilty of contributory negligence, this record satisfies beyond doubt that the alleged errors in the rulings of the court on these subjects, as well as on matters relating to the question whether the cause of action arose under the federal law or under the state law, did not prejudice and could not have prejudiced the defendant, and they are accordingly dismissed without further discussion, whether they were made upon questions regarding the pleadings, upon the admission or exclusion of evidence, in the charge of the court, or in its refusal of requested instructions."

**§ 152. Pleading Cause of Action Under State Law in One Count and Under Federal Act in Another Count, Allowed.**—All of the courts have generally agreed on the proposition that the plaintiff, he is the proper party under both laws, may set up facts in









one count of the petition showing liability under the federal act, and may, in another count of the same petition, plead facts showing liability under the state law. In other words, the pleader may charge a violation of both laws in separate counts of the same petition. After so pleading liability under both laws, at what stage of the proceedings subsequently, he will be required to elect, if at all, depends upon the rules of procedure of the courts of the state where the suit is pending. As the federal law, when applicable, gives the exclusive remedy and as, in some states, the questions involved under the state and federal act are very different, some conflict has arisen as to when a motion to elect, should be sustained, and these cases will be hereinafter reviewed. On the other proposition, as to whether liability under the two laws may be pleaded in separate counts in the same petition, the Supreme Court of the United States approved the practice, although such questions necessarily depend upon the rules of pleading in the state where the action is pending.<sup>20</sup> In the Hayes case, the United States Supreme Court said: "The plaintiff asserted only one right to recover for the injury, and in the nature of things he could have but one. Whether it arose under the

20. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 6 N. C. C. A. 224, affirming same case reported in 180 Ill. App. 511; *Bankson v. Illinois C. R. Co.*, 196 Fed. 171; *Midland V. R. Co. v. Ennis*, — Ark. —, 6 N. C. C. A. 80n, 234n, 159 S. W. 214; *Atkinson v. Bullard*, — Ga. App. —, 6 N. C. C. A. 80n, 183n, 80 S. E. 220. A demurrer on the ground of misjoinder of counts where a cause of action under the federal law is stated in one count and under the state law in another, should be overruled. *Bouchard v. Central V. R. Co.*, 87 Vt. 399, 6 N. C. C. A. 78n, 81n.

federal act or under the state law, it was equally cognizable in the state court; and had it been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, the propriety of proceeding to a judgment under the latter count, after it appeared that the first could not be sustained, doubtless would have been freely conceded. Certainly nothing in the federal act would have been in the way."

**§ 153. Petition Need Not Specifically Refer to the Act if Facts Showing Liability Thereunder are Plead.**—If the petition of the plaintiff alleges facts which show that the defendant was a common carrier by railroad in interstate commerce at the time of the accident and that the plaintiff was employed by it in such commerce, the statute applies, although no reference is made to it in the petition.<sup>21</sup> Since all state courts are required to take judicial notice of the federal law, it is not necessary to specifically plead that law if facts showing liability thereunder are stated in the petition.<sup>22</sup> The petition need not state in so many words that the action is brought under the federal statute. It is sufficient if the statement of facts in the petition bring the cause within the terms of the statute.<sup>23</sup>

21. *Grand T. W. Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 6 N. C. C. A. 90, 91n, Ann. Cas. 1914 C 168n; *Garrett v. Louisiana & N. Ry. Co.*, — U. S. —, 35 Sup. Ct. 32; s. c., 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, 4 N. C. C. A. 925n; *Kelly v. Chesapeake & O. Ry. Co.*, 201 Fed. 602; *Vandalia R. Co. v. Stringer*, — Ind. —, 106 N. E. 865.

22. *McDonald v. Railway T. Co.*, 121 Minn. 273.

23. *Kansas City S. Ry. v. Cook*, 100 Ark. 467; *Cound v. Atchison, T.*





**§ 154. State Law as to Sufficiency of Pleading Governs.**—In an action under the federal act brought in the state courts, the rules of pleading and procedure of the state where the action is being prosecuted, governs throughout.<sup>24</sup> When a general allegation of negligence is sufficient under the rules applied by the state courts in ordinary actions, such an allegation is sufficient in an action under the federal act prosecuted in the state court.<sup>25</sup>

**§ 155. Allegations as to Engagement in Interstate Commerce Held Sufficient.**—A petition in an action for personal injuries stating that the defendant was a common carrier by railroad and engaged in interstate commerce between several states and that the plaintiff was employed as a brakeman on a freight train running from one state to another, contained sufficient allegations to show interstate employment within the terms of the federal act.<sup>26</sup> Where the injury was stated in the petition of plaintiff in an action under the federal act, to have been caused by the negligence of the railway company while it was engaged as a common carrier in carrying on interstate commerce and while the plaintiff was employed by it in such commerce, the allegation was

& S. F. Ry. Co., 173 Fed. 527; *Clark v. Southern P. Ry. Co.*, 175 Fed. 122; *Whittaker v. Illinois C. Ry. Co.*, 176 Fed. 130.

24. *Fleming v. Norfolk S. R. Co.*, 160 N. C. 196, 6 N. C. C. A. 78n, 229n; *Chesapeake & O. Ry. Co. v. Kelley's Adm'x*, — Ky. —, 171 S. W. 185; *Gibson v. Billingham & N. Ry. Co.*, 213 Fed. 488; *Winters v. Minneapolis & St. L. R. Co.*, — Minn. —, 6 N. C. C. A. 78n, 201n, 148 N. W. 106.

25. *Louisville & N. R. Co. v. Stewart*, 156 Ky. 550, 6 N. C. C. A. 79n, 447n, 450n, 454n.

26. *Kansas City S. Ry. Co. v. Cook*, 100 Ark. 467.



held sufficient.<sup>27</sup> A petition, in an action by an administrator under the federal act, alleging that the railroad on which decedent was killed ran from one state to another, that he was killed in making up a train to be moved to another state and that the defendant ran trains over the state line, contained a sufficient statement as to the applicability of the federal act in connection with other facts showing negligence and dependency.<sup>28</sup> A petition for personal injuries against a railroad company which alleged that the company was a corporation of the state, that the injured employe was working on a

27. *Grand Trunk W. Ry. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 6 N. C. C. A. 90, 91n, Ann. Cas. 1914 C 168n.

A complaint in an action against a common carrier by railroad for injuries to a brakeman stated that the defendant was a railroad corporation engaged in interstate commerce and alleged that the brakeman was injured by reason of the carelessness of the engineer in permitting the water to become low on the crown sheet of the locomotive and then suddenly injecting water into the boiler which caused a sudden and extreme amount of steam to be generated and caused the crown sheet to drop into the fire box, producing a loud report and noise, which led the brakeman to believe he was in danger of great bodily harm, and, acting on that belief, jumped from the window of the cab and was injured. It was held that the complaint stated sufficient facts to show a cause of action either under the state statute or under the federal statute. *Vandalia R. Co. v. Stringer*, — Ind. —, 106 N. E. 865. The court in the case just cited decided that the plaintiff in an action for injuries is only required to plead the facts and that a recovery may be then had according as the evidence may develop a case under the one liability or the other. While the complaint in this case may have been sufficient under the laws of the state, yet it was not sufficient to show a cause of action under the federal statute as there was no allegation or facts pleaded showing that the injured employe at the time of the injury was employed in interstate commerce although there was an allegation that the railroad company was so engaged.

28. *Fort Worth & D. C. Ry. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279; *Hackett v. Chicago, I. & L. R. Co.*, 170 Ill. App. 140.







bridge which formed a part of the track and roadbed of the railroad company and that while so engaged he was injured, was held to have stated a cause of action under the federal act although the petition did not state that the company was engaged in interstate commerce.<sup>29</sup> A complaint alleging that the defendant, as a common carrier by railroad, owned a line of railroad from a point in one state to a point in another and that the plaintiff while working on a passenger train on said road, was injured in a head-on collision due to the negligence of the defendant, stated a cause of action under the federal act.<sup>30</sup> A complaint stating that the plaintiff, when he was injured, was employed as a fireman on a passenger train running from Chicago, Illinois, to Milwaukee, Wisconsin, was held sufficient to show that the company was engaged in interstate commerce and that the plaintiff was employed by it in such commerce.<sup>31</sup>

**§ 156. Allegation to Show Cause of Action Under the Federal Act Held Not Sufficient.**—An allegation that “at the time of the injuries hereinafter complained of, your petitioner was engaged in the transportation of interstate commerce” was held not to state a cause of action under the National Employers’ Liability Act for the reason that there was no further allegation that the railroad company was a common carrier by railroad engaged in interstate commerce

29. *McIntosh v. St. Louis & S. F. Ry. Co.*, — Mo. App. —, 168 S. W. 821. The correctness of this ruling is doubtful.

30. *Seaboard A. L. Co. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171.

31. *Rowlands v. Chicago N. W. Ry. Co.*, 149 Wis. 51.

at the time of the injury.<sup>32</sup> In another case it was alleged in the petition that the plaintiff was injured through the negligence of a co-employee, while loading rails on a car. The petition did not disclose where the rails came from or where destined or the destination of the car after being loaded or whether the rails were old or new. The court held that the allegation was insufficient to show employment in interstate commerce.<sup>33</sup>

**§ 157. In Cases of Death Petition Must Allege Survival of Beneficiaries Named in Statute.**—Unless the petition shows, in case of death, that the deceased left a widow, child, parent or dependent next of kin, naming them, it does not allege a cause of action under the federal act.<sup>34</sup> Where the petition failed to allege that decedent left any of the beneficiaries for whose benefit a right of action survives under the federal act, the petition is defective even though it is alleged that by reason of the facts alleged a cause of action had accrued to plaintiff against defendant under and by virtue of that act.<sup>35</sup> If the petition in an action under the federal act fails to allege that the decedent is survived by a person or persons coming within one of the three classes men-

32. *Walton v. Southern Ry. Co.*, 179 Fed. 175; *contra*, *McIntosh v. Wabash R. Co.*, — Mo. App. —, 168 S. W. 821.

33. *Tsmura v. Great N. R. Co.*, 58 Wash. 316, 3 N. C. C. A. 786n.

34. *North Carolina Ry. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n; *Michigan C. R. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n; *Gulf C., etc., Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n; *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 766, 6 N. C. C. A. 439n, 446n.

35. *Thomas v. Chicago & N. W. Ry. Co.*, 202 Fed. 766, 6 N. C. C. A., 439n, 446n.





tioned in the statute it is bad on demurrer.<sup>36</sup> The petition must state, in case of death, how many children there are and their ages.<sup>37</sup>

**§ 158. Petition Must Allege Pecuniary Loss to Beneficiaries.**—In any action under the federal act for the negligent death of a deceased employe, the petition must allege that the beneficiaries named, suffered pecuniary loss from the death. The federal statute does not presume that any of the beneficiaries are dependent upon the decedent, and as the statute is compensatory, and not penal, such a fact must be alleged as proof of it is required.<sup>38</sup> But where a declaration was defective because of the omission of this necessary allegation, and the point was not raised until the case reached the appellate court, it was held that the objection came too late.<sup>39</sup> In affirming the decision of the federal circuit court of appeals in the Garrett case, cited in the notes, the Supreme Court of the United States said: “Where any fact is necessary to be proved in order to sustain the plaintiff’s right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may

36. *Illinois C. Ry. Co. v. Doherty’s Adm’r*, 153 Ky. 363, 6 N. C. C. A. 75n, 440n, 444n, 47 L. R. A. (N. S.) 31n.

37. *Chesapeake & O. Ry. Co. v. Dwyer’s Adm’x*, 157 Ky. 590, 6 N. C. C. A. 449n.

38. *Garrett v. Louisville & N. R. Co.*, — U. S. —, 35 Sup. Ct. 32, affirming same case reported in 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, 4 N. C. C. A. 925n; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 3 N. C. C. A. 807, Ann. Cas. 1914 C 176n; *Gulf C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 3 N. C. C. A. 806, 4 N. C. C. A. 926n.

39. *Illinois C. R. Co. v. Porter*, 207 Fed. 311, 6 N. C. C. A. 98n, 205n.



come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. *Bank of United States v. Smith*, 11 Wheat. (U. S.) 171, 174, 6 L. Ed. 443, 444; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 67, 7 L. Ed. 47, 56; *DeLuca v. Hughes*, 96 Fed. 923; *Rose v. Perry*, 8 Yerg. (Tenn.) 156; *Citizens' Street R. Co. v. Burke*, 98 Tenn. 650, 40 S. W. 1085, 2 Am. Neg. Rep. 459; 1 Chitty, Pl. 270. \* \* \* The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. Common experience teaches that financial damage to a parent by no means follows as a necessary consequence upon the death of an adult son. The plaintiff expressly declined in both courts below so to amend his declaration as to allege pecuniary loss to the parents; and judgment properly went against him. The request is now made that, in view of all the circumstances, especially the former undetermined meaning of the statute, this court remand the cause for a new trial upon the declaration being so amended as to include the essential allegation. But we do not think such action would be proper. The courts below committed no error of which just complaint can be made here; and the rights of the defendant must be given effect, notwithstanding the unusual difficulties and uncertainties with which counsel for the plaintiff found himself confronted."





**§ 159. In Suits Under State Laws, Applicability of Federal Act May be Raised by Answer.**—In any action against a common carrier by railroad by an employe for personal injuries due to negligence, it will be presumed, in the absence of allegations to the contrary in the petition, that the plaintiff is seeking a remedy under the laws of the state and not under the federal act.<sup>40</sup> However, if the injury occurred or the death happened while the common carrier was engaged in interstate commerce and the injured employe was working for it in such commerce, such facts may be set up in the answer by the defendant and, if proven, will defeat the plaintiff's attempt to recover under the laws of the state.<sup>41</sup>

**§ 160. Where Petition Is Under State Law and Evidence Shows Case Under Federal Statute, Plaintiff Cannot Recover.**—When the petition in an action by an injured employe against a common carrier by railroad for damages, states facts which constitute a cause of action solely under the laws of a state, and the plaintiff's evidence discloses that at the time he was injured the plaintiff was engaged in interstate commerce and that the defendant was so engaged, there is a fatal variance between the plead-

40. *Bradbury v. Chicago, R. I. & P. Ry. Co.*, 149 Iowa 51, 40 L. R. A. (N. S.) 684n; *Erie R. Co. v. Welsh*, — Ohio St. —, 6 N. C. C. A. 77n, 188n, 105 N. E. 190; *Missouri, etc., Ry. Co. v. Neaves*, — Tex. Civ. App. —, 127 S. W. 1090; *Missouri, etc., R. Co. v. Hawley*, — Tex. Civ. App. —, 123 S. W. 726; *Fleming v. Norfolk S. Ry. Co.*, 160 N. C. 196, 6 N. C. C. A. 78n, 229n; *Neil v. Idaho R. Co.*, 22 Idaho 74.

41. *Seale v. St. Louis, S. F. & T. R. Co.*, 229 U. S. 156, 57 L. Ed. 1129, Ann. Cas. 1914 C 156n, reversing same case reported in — Tex. Civ. App. —, 148 S. W. 1099; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379.

ing and the proof, because the case pleaded is not the case proven and the case proven is not the case pleaded. If the defendant, therefore, raises the objection in the proper manner according to the rules of the state where the action is pending, the plaintiff cannot recover and the defendant is not estopped from raising the point although he pleaded in his answer defenses which are solely applicable to the laws of the state.<sup>42</sup> In the case of *Seale v. St. Louis*,

42. *Seale v. St. Louis, S. F. & T. R. Co.*, 229 U. S. 155, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156n; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 6 N. C. C. A. 75n, 87n, 81n, 86n, 233n; *Winfred v. Northern P. R. Co.*, 227 U. S. 296, 57 L. Ed. 518, affirming 173 Fed. 65; *Gaines v. Detroit, G. H. & M. Ry. Co.*, — Mich. —, 6 N. C. C. A. 202n, 148 N. W. 397; *Midland V. R. Co. v. Ennis*, — Ark. —, 6 N. C. C. A. 80n, 234n, 159 S. W. 215.

In *Toledo, St. L. & W. R. Co. v. Slavin*, — U. S. Sup. Ct. —, decided February 23, 1915, an action by an employe against a common carrier by railroad for personal injuries, neither the plaintiff's complaint nor the defendant's answer contained any reference to the Federal Employers' Liability Act. But notwithstanding this failure to plead the Federal Act in the answer, evidence was admitted, over plaintiff's objection, which showed that the train on which plaintiff was riding at the time of the injury was engaged in interstate commerce. After the introduction of this evidence, the railroad company insisted that the case was governed by the Federal Act and moved the court for a directed verdict in its favor. This request having been refused, the defendant asked the court to give to the jury in its charge several applicable extracts from the Federal Statute. These requests were refused, the trial court holding that the state law governed as to assumption of risk. A verdict for the plaintiff resulted. On a writ of error from a common pleas court where the case was tried to the circuit court, the latter court held that as the plaintiff was injured while engaged in interstate commerce, the cause was governed by the Federal Statute and the common law rule of assumption of risk applied and that the defendant's motion for a directed verdict should have been granted. On appeal to the Supreme Court of Ohio the judgment of the circuit court was reversed and that of the common pleas court was affirmed. In reversing the judgment of the Supreme Court of Ohio, the United







S. F. & T. R. Co., cited in the notes, the plaintiff's petition stated a cause of action under the statute of the state, but the evidence disclosed that the decedent was killed while engaged in interstate commerce. The court reversed the judgment and said: "It comes, then, to this: the plaintiffs' petition, as ruled by the state court, stated a case under the state statute. \* \* \* When the evidence was adduced it developed that the real case was not controlled by

States Supreme Court held that if a suit is brought under a state law and the evidence shows that the federal act is applicable, there can be no recovery. The court said:

"The case having been brought here by writ of error, counsel for the plaintiff, Slavin, insists that the judgment of reversal, without opinion, should not be construed as meaning that the State court decided the Federal question adversely to the Company's claim; but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that the plaintiff had been engaged in interstate commerce, and, hence, that there was nothing properly in this record to support the contention that the defendant had been deprived of a Federal right. But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the State statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law. In this respect the case is much like *St. Louis, etc., Ry. v. Seale*, 229 U. S. 156, 161, where the suit was brought under the Texas statute, but the testimony showed that the plaintiff was injured while engaged in interstate commerce. The court said: 'When the evidence was adduced it developed that the real case was not controlled by the State statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State court erred in overruling it.' The principle of that

the state statute, but by the federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded.”

**§ 161. Defendant in Suit Under State Law Must Specifically Plead Federal Act to Defeat Recovery.—**

On the other hand, if the plaintiff's petition states a cause of action under the laws of the state and his evidence establishes and is in harmony with the allegations of his petition, the fatal variance in plaintiff's proof, which appeared in the cases cited in the preceding paragraph, is non-existent and the defendant in order to defeat a recovery under the state law by showing that the case is one arising under the federal act, must plead the facts showing, that the plaintiff at the time of the injury, was employed in interstate commerce and that the carrier was so engaged at

decision and others like it is not based upon any technical rule of pleading but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars. Here the Ohio statute abolished the rule of the common law as to the assumption of risks in injuries occasioned by defects in tracks, while the Federal statute left that common law rule in force, except in those instances where the injury was due to the defendant's violation of Federal statutes, which—like the Hours of Labor Law and the Safety Appliance Act—were passed for the protection of interstate employees. *Seaboard Air Line v. Horton*, 233 U. S. 492, 503. In all other respects this case is exactly within the ruling in the case last cited, where the employee's knowledge of the existence of the defect and the terms of the State statute relied on were substantially the same as those in the present case. There the judgment of the State court—applying the State statute—was reversed because it appeared, as it does here, that the plaintiff had been injured while engaged in interstate commerce and, consequently, the case should have been tried and determined according to the Federal Employers' Liability Act. The judgment of the Supreme Court of Ohio is reversed and the case remanded for further proceedings not inconsistent with this opinion.”





the same time. Unless such a plea is made such evidence is not admissible on behalf of the defendant.<sup>43</sup> Where the defendant files such a plea in an amended answer after the evidence was all in it was held not to be in abuse of discretion for the trial court on motion of plaintiff, to strike out the amendment.<sup>44</sup> Cases holding that when a widow is suing in her individual capacity for the death of an interstate employe, her want of capacity to sue may be raised at any stage of the proceedings without the point being raised by answer, are not in conflict with the cases just cited for the reason that the defeat or want of legal capacity appears on the face of plaintiff's pleadings.<sup>45</sup>

**§ 162. When Amendment of Petition Permissible After Two-Year Period of Limitation.**—Where a mother, the sole heir and dependent of a deceased employe, a single man, sued in her individual

43. *Illinois C. R. Co. v. Nelson* (C. C. A.), 212 Fed. 69; *Bradbury v. Chicago, R. I. & P. Ry. Co.*, 149 Iowa 51, 40 L. R. A. (N. S.) 684n; *Erie R. Co. v. Welch*, — Ohio —, 6 N. C. C. A. 77n, 188n, 105 N. E. 189; *Fleming v. Norfolk S. R. Co.*, 160 N. C. 196, 6 N. C. C. A. 78n, 229n; *Chicago, R. I. & P. Ry. Co. v. McBee*, — Okla. —, 145 Pac. 331; *Chicago, R. I. & P. Ry. Co. v. Rogers*, — Tex. Civ. App. —, 150 S. W. 281; *Bitondo v. New York, C. & H. R. Co.*, 163 App. Div. (N. Y.) 823; *contra*, *Gray v. Chicago & N. W. Ry. Co.*, 153 Wis. 636, 4 N. C. C. A. 225n; *Vandalia R. Co. v. Stringer*, — Ind. —, 106 N. E. 865.

44. *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 40 L. R. A. (N. S.) 684n.

45. *Vaughn v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 6 N. C. C. A. 75n, 438, 439n; *Missouri, K. & T. Ry. Co. v. Lenahan*, 39 Okla. 283, 6 N. C. C. A. 75n, 78n, 437n; *Dungan v. St. Louis & S. F. R. Co.*, 178 Mo. App. 164, 6 N. C. C. A. 438, 439n; *LaCasse v. New Orleans, T. & M. R. Co.*, — La. —, 6 N. C. C. A. 196n, 437n, 64 So. 1012; *Southern Ry. Co. v. Howerton*, — Ind. —, 101 N. E. 121; *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879; *Cincinnati, N. O. & T. P. Ry. Co. v. Bonham*, — Tenn. —, 171 S. W. 71.

capacity and in her first and original petition, sufficiently averred that his death was caused by injuries while the carrier was engaged and he was employed in interstate commerce, but also in her petition referred to and asserted a right to sue under the laws of Kansas, an amendment of the petition after the two-year period of limitation, permitting her to sue as administratrix as required by the federal act, was properly allowed.<sup>46</sup> In the Wulf case the decedent was a locomotive fireman on a train bound from Kansas into Oklahoma and these facts, constituting employment in interstate commerce, appeared in the original petition. Notwithstanding the fact that the plaintiff erroneously, under the facts stated in her petition, asserted her right to recover under the state laws, yet the court, when the facts stated in her

46. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. Ed. 355, 6 N. C. C. A. 230n, 237n, Ann. Cas. 1914 B 134n, affirming same case in 192 Fed. 919; *accord*, *Bixler v. Pennsylvania R. Co.*, 201 Fed. 553; *Reardon v. Balaklala C. C. Co.*, 193 Fed. 189; *Atlanta, K. & N. R. Co. v. Smith*, 1 Ga. App. 162.

In an action by a brakeman against a common carrier by railroad, the cause was reversed on appeal because the brakeman was guilty of such contributory negligence as to bar a recovery. (*Cincinnati, N. O. & T. P. Ry. Co. v. Goode*, 153 Ky. 247.) On motion for rehearing, the court held, in view of the fact that the evidence disclosed the brakeman was engaged in interstate commerce at the time of the injury and that the remedy provided by the federal act was exclusive, that the cause should be reversed so the plaintiff, if he deemed it advisable, might amend his petition. (*Cincinnati, N. O. & T. P. Ry. Co. v. Goode*, 155 Ky. 153.) Upon the return of the case to the trial court, after being so remanded, the plaintiff filed an amended petition setting out more distinctly than he did in his original petition, facts sufficient to bring his case within the scope of the federal act. The amended petition was filed more than two years from the date of the injury. To this petition the defendant filed an answer in which it pleaded the statute of limitation because the









petition showed liability exclusively under the federal act, would take judicial notice that the state law mentioned in the petition, was superseded by the federal act and that the cause of action was not changed any more than if the plaintiff had referred to any other repeal statute. Aside from the capacity in which she sued, there was no substantial difference between the original and the amended petition, the same state of facts as to interstate commerce being alleged in both. The change was in form rather than in substance nor did the amended petition set up any different state of facts as the ground of action and therefore the amended petition related back to the beginning of the suit. This case has been sometimes cited as authority for the proposition that a petition setting up no facts, showing the engagement of the carrier and the employment by it of the servant in

injury occurred in March, 1910, more than two years before the filing of the amended petition in November, 1913. In sustaining the right of the plaintiff to so amend the petition, the Kentucky Court of Appeals said: "The original action was brought within two years from the time of the injury complained of and unless the amended petition filed in November, 1913, set up some new and distinct cause of action it should be treated as a part of the original petition and relate back to the date when it was filed. An inspection of these pleadings shows very clearly that the amended petition did not set up or attempt to set up any new cause of action or any cause of action that was not relied on in the original petition. In fact, the original petition stated a good cause of action under the federal statute; but both parties after the filing of the petition, seemed to treat the case as falling under the state law, and it proceeded to judgment in that way. The amended petition merely reiterates the averments of the original petition, setting out perhaps more fully than it did the facts showing that the cause of action arose under the federal statute. This being so, the trial court did not err in ignoring the plea of limitation." *Cincinnati, N. O. & T. P. R. Co. v. Goode*, — Ky. —, 173 S. W. 329.

interstate commerce at the time of the injury, may be amended even after the two-year period of limitation provided by the federal act, so as to show a cause of action under the national statute. The decision, however, does not go to that length because the court found that the original petition sufficiently averred facts showing employment in interstate commerce, the sole change being the capacity in which the plaintiff sued. The mere fact that the plaintiff referred to the Kansas statute in her petition as authorizing the recovery, the court treated as nugatory in view of the other facts showing liability under the national act. A former case<sup>47</sup> in which the plaintiff sued under the common law and sought after the limitation period to amend by basing his cause of action on the statute of Kansas, was distinguished, in that the ground of recovery was changed, and the court, the suit being tried on removal in a federal court in Missouri, would not take judicial notice of a Kansas statute.<sup>48</sup>

47. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983.

48. After the decision of the Texas Civil Court of Appeals was reversed in the United States Supreme Court in *St. Louis, S. F. & T. Ry. Co. v. Seale* (229 U. S. 156, 57 L. Ed. 1129, 3 N. C. C. A. 800, Ann. Cas. 1914 C 156), one of the plaintiffs in that suit, the widow of the decedent, intermarried with one Smith, and after the return of the mandate from the United States Supreme Court, she was appointed administratrix of his estate and thereafter upon motion she was substituted as party plaintiff in lieu of the original parties plaintiff. She then immediately filed an amended petition, in which she prosecuted the action as the personal representative of the deceased. As administratrix she obtained another verdict which was affirmed on appeal, the court holding that the amendment was proper even after the two-year period of limitation. *St. Louis, S. F. & T. Ry. Co. v. Smith*, 171 S. W. 512, 160 S. W. 317. Whether the Supreme Court of the United States will sustain such an amendment when it decided





**§ 163. When Amendments After Limitation Period Not Allowed.**—But where an action for wrongful death was brought by deceased's widow as such, under a state statute giving her alone the right of action, for her sole benefit, an amendment to the declaration, changing the relation in which she sues from that of widow to that of administratrix, for the benefit of herself as widow and her children, and changing her cause of action to one under the Federal Employers' Liability Act, while permissible, yet, if made under the limitation period under the latter statute, does not relate back to the time of the commencement of the original action so as to avoid the bar of the statute of limitation, being in effect the bringing of a new action under the federal statute.<sup>49</sup> The Hall case cited is quite different from the Wulf case for here the widow was the sole party in the original petition; the widow and children were asserting rights in the amended petition. Neither did the original petition state facts showing liability under the national act. In another case a brakeman brought an action against a railroad company which stated a cause of action under the common law. The injury occurred on February 29, 1904. Suit was

that the original petition in the Seale case stated no facts showing the engagement of the company and the employment of the deceased in interstate commerce (229 U. S. l. c. 158, 57 L. Ed. l. c. 1133) but on the other hand held that the original petition in the Wulf case stated facts showing such to be true (226 U. S. l. c. 575, 57 L. Ed. l. c. 363) remains to be seen.

49. Hall v. Louisville & N. R. Co., 157 Fed. 464, aff'd 98 C. C. A. 664, 174 Fed. 1021.



brought on July 1, 1904. On January 21, 1909, the plaintiff asked leave to file an amended petition setting up a cause of action under the Federal Safety Appliance Act specifically under the section as to automatic couplers. Defendant objected to the allowance of the amendment on the ground that it introduced a new cause of action which was barred by the statute of limitation. The court sustained this assignment and held that the amended answer set up a new cause of action and was improperly allowed by the trial court and is barred by the statute of limitation. The court in passing upon the propriety of the amendment said: "But, it will be observed, in the amendment there was a departure, not one from the facts as allowed in the original statement, but also from the law as applicable to the facts in the original statement. In other words, there was a departure, not one from fact to fact, but from law to law. \* \* \* The original statement, it is true, averred the injuries of the plaintiff and the alleged negligence of the defendant by which they were caused but there was no intimation in the statement that the carrier was engaged in interstate commerce or that the defendant's cars were equipped with couplers in violation of the Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the decisions in determining whether the amendment introduced a different cause of action. It is apparent that without this amendment the Act of Congress could have had no place in the case, and







could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks or dangers of his employment.' ' 50

50. *Allen v. Tuscorora V. R. Co.*, 229 Pa. 97, 30 L. R. A. (N. S.) 1096n, 140 Am. St. Rep. 714. The court in its decision followed *Union P. Ry. Co. v. Wyler*, 158 U. S. 285, 39 L. Ed. 983.

## CHAPTER XII

### EVIDENCE UNDER FEDERAL ACT

§ 164. Rules of Evidence Governed by State Law.

§ 165. Law of Forum Determines Whether Widow or Other Beneficiaries May Testify.

§ 166. State Law Not Applicable in Passing on Demurrer to the Evidence.

§ 167. Record Evidence of Interstate Shipments—Statutory Provision and Order of Interstate Commerce Commission.

§ 168. Method of Proving When Train and Switching Crews Are Engaged in Interstate Commerce.

§ 169. Method of Proving When Other Railroad Employees Are Engaged in Interstate Commerce.

§ 170. Evidence Held Sufficient to Show That Train Was Carrying Interstate Commerce.

§ 171. Evidence Held Not Sufficient to Show That Train Was Carrying Interstate Commerce.

#### § 164. Rules of Evidence Governed by State Law.

—In all actions against common carriers by railroads under the Federal Employers' Liability Act, prosecuted in state courts, the rules of evidence enforced in the federal courts do not control, for the reason that the law of evidence is a part of the law of procedure and the procedure is always governed by the law of the forum. The Supreme Court of Arkansas, in the case cited in the notes, stated the rule as follows: "It is a well-established rule that, in actions in a state court to enforce rights given by a federal statute, the rules of evidence of the state court must control unless otherwise provided by the federal law."<sup>1</sup>

1. Kansas City S. Ry. Co. v. Leslie, — Ark. —, 6 N. C. C. A. 446, 447n, 453, 454n, 167 S. W. 83.





**§ 165. Law of Forum Determines Whether Widow or Other Beneficiaries May Testify.**—Whether a widow or other beneficiary named in either one of the three classes under the federal statute, may testify in any action brought by an administrator in their behalf, is to be determined by the law of the state where the action is pending. Applying this rule, the Supreme Court of North Carolina held that a mother of a deceased employe, killed while employed in interstate commerce, was a competent witness in an action brought under the federal act by an administrator, for his death.<sup>2</sup>

**§ 166. State Law Not Applicable in Passing on Demurrer to the Evidence.**—In all actions prosecuted under the federal act in state courts, the question whether there has been sufficient evidence introduced to justify the trial court in submitting the case to the jury is not to be determined by the laws of the state nor the decisions of its courts, but by the controlling decisions of the national courts, as such a question is not one of procedure but one which involves the substantive rights of the parties.<sup>3</sup>

**§ 167. Record Evidence of Interstate Shipments—Statutory Provision and Order of Interstate Commerce Commission.**—The Act of Congress regulating interstate commerce empowers the Interstate Commerce Commission to prescribe the forms of all “accountings, records and memoranda of the movement of traffic” made by common carriers engaged in

2. *Irvin v. Southern Ry. Co.*, — N. C. —, 80 S. E. 78.

3. *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, reversing same case reported in 145 Ky. 427.



interstate commerce.<sup>4</sup> The statute also provides that any carrier "who shall wilfully neglect or fail to make full, true and correct entries in such accountings, records or memoranda of all facts and transactions appertaining to the carrier's business" shall be deemed guilty of a crime. It is further provided in the statute that the Interstate Commerce Commission may issue orders specifying such operating records, books, blanks, tickets, stubs or documents of carriers which may, after a reasonable time, be destroyed, and prescribe the length of time such books, papers or documents shall be preserved. Pursuant to the authority given in this statute, the Interstate Commerce Commission has issued and formulated a general order regulating the destruction of all records on steam roads.<sup>5</sup>

**§ 168. Method of Proving When Train and Switching Crews are Engaged in Interstate Commerce.—**

While courts have without objection permitted oral evidence to show that trains contained interstate shipments, yet in view of the fact that a permanent record of such transactions are required by statute to be made and preserved by all common carriers engaged in interstate commerce, they may hold, even in actions under the Federal Employers' Liability Act, if objection is made, that oral evidence is not

4. Act June 29, 1906, c. 3591, § 7, 34 Stat. 593; Act, Feb. 25, 1909, c. 193, 35 Stat. 649.

5. Order regulating destruction of records of steam roads in accordance with § 20 of the Act to regulate commerce issued on the first day of June, 1914, and effective on the first day of July, 1914, superseding and cancelling orders dated June 10, 1910, June 8, 1911, and October 7, 1912.





admissible on the ground that it is not the best evidence.<sup>6</sup> As all members of train crews and switching crews are not engaged in interstate commerce unless there are interstate shipments in the train, or "drags" in switching yards, upon which they are employed, plaintiffs in actions under the federal act must therefore produce evidence showing such employment. Assuming that oral proof is admissible, yet often such evidence is not available and the plaintiff, or the defendant in seeking to show that the federal act does not apply, must produce some record showing that there were interstate shipments on the train. All railroad companies keep and maintain a multitude of records concerning the transportation of all freight and passengers. They are required by law to be faithfully and accurately kept and most of them must be preserved for six years under the order of the Interstate Commerce Commission. Relating to the transportation of freight and passengers, the records usually kept are the dispatcher's records, records of hours of service, conductor's train and car reports, commonly known as wheel reports, freight waybills, bills of lading and ticket and baggage records. Most of these records are kept in the office of the superintendent at division points. The records of the dispatchers are commonly known

6. *Pfeiffer v. Oregon-Washington R. & N. Co.*, — Ore. —, 144 Pac. 762, 7 N. C. C. A. 685.

Notwithstanding a railroad company keeps records showing the origin and destination of every loaded or empty car in a train, yet it is competent for a conductor to testify orally that some of the cars in the train were destined to points beyond the state. *Devine v. Chicago, R. I. & P. R. Co.*, — Ill. —, 107 N. E. 595.

as train sheets in which are kept a daily record showing the movement of all trains over the division, time of departure and arrival at each station, number of train, names of engineer and conductor with number of cars in the train. Registers are also kept in which entries are made by all train employes showing number of hours the employes were on duty. These registers show the train upon which the employe worked, the number of cars on the train, whether loaded or empty, and between what points the train was operated. On all trips between terminals conductors are generally required to make out and deliver at destination points wheel reports which show the date the trains moved, the number of the trains, the initials and number of cars, the initial and destination point on each car over the division and the mileage of the cars and train. These wheel reports are required to be kept for three years if transcribed into other records and if not so transcribed, for six years. Every common carrier engaged in interstate commerce is also required to issue a receipt or bill of lading for all shipments. The originals of these contracts are usually delivered to the shipper and duplicate copies are retained by the carrier. In addition to these bills of lading the carrier makes out for each shipment a waybill which waybill accompanies the car from point of origin to point of destination and is handled successively by the conductors of the trains in which the shipment is carried and usually by foremen of the switching crews at terminal points. Carbon copies of all such waybills are kept at the point of origin. There







are three classes of waybills, local waybills, that is, where the shipment is between two points on the same line, interline waybills where cars are transported by more than one carrier and company freight waybills which denotes that merchandise carried belongs to the railroad company. In addition to these there are baggage records showing the initial and destination point of all baggage shipped. These are required to be retained for a period of three years. All these records may be obtained by subpoena *duces tecum* served upon the officers of the company in charge of the records called for in the subpoena.

**§ 169. Method of Proving When Other Railroad Employes are Engaged in Interstate Commerce.**—Proof that the line upon which they are working, is used by the railroad company indiscriminately in moving both interstate and intrastate commerce, is sufficient to show that such employes as linemen, signalmen, bridge carpenters, section men and similar employes are employed in interstate commerce. In the same way, to show that car repairers and engine repairers are engaged in interstate commerce, it is sufficient for the evidence to disclose that the car or the engine upon which they were at work when injured, was used indiscriminately in moving both kinds of commerce.

**§ 170. Evidence Held Sufficient to Show That Train was Carrying Interstate Commerce.**—In an action under the federal act the plaintiff testified that he was an engineer and had been hauling certain passenger trains, calling them by number, for several

years, one running east and the other west. He spoke of them as through passenger trains. Another witness testified that the plaintiff was an engineer for the defendant, running on the "Black Hills Division;" such division, he said, being west of Long Pine, with headquarters at Chadron. The action was being prosecuted in the state courts of Nebraska and the question was presented to the court whether this evidence was sufficient to show that the plaintiff was an engineer on an interstate train. The court said: "While the evidence of the interstate character of trains, three and six, is not as clear and satisfactory as it could and should have been made, we think it was sufficient to take the case to the jury on that point. \* \* \* We take judicial notice of the fact that the Black Hills are in South Dakota. We think we may also take judicial notice of the fact, well known to every citizen of even ordinary intelligence in the State of Nebraska, that the west terminus of defendant's road, which runs through Long Pine is in the Black Hills. With these facts established, and the further fact established by the evidence that Long Pine is the division point on the Black Hills division, of which Chadron is the headquarters, the testimony of plaintiff that trains three and six were through trains, meant that they were trains running through the Black Hills Division, which would be from Long Pine to the Black Hills. Being such trains, they were interstate trains, engaged in interstate business.<sup>7</sup> In an action prosecuted in the state

7. *Bower v. Chicago & N. W. R. Co.*, — Neb. —, 6 N. C. C. A. 213n, 148 N. W. 145.





courts of Texas for the death of an engineer who was killed while operating a train between two points in the State of Arizona, the plaintiff introduced testimony that the train on which the deceased was an engineer, consisted of fifty cars, most of them being loaded with oil and lumber; that the defendant's line ran from California through Arizona and New Mexico; that most of the lumber and oil shipped by the defendant from the west came from California. In connection with this testimony, one of defendant's officers testified that if fifty cars were going east on the track where the engineer was killed, it was quite likely that the greater portion of them came from California. The court held that the evidence was sufficient to submit the case to the jury as to whether the decedent was engaged in interstate commerce at the time of the accident.<sup>8</sup>

**§ 171. Evidence Held Not Sufficient to Show That Train was Carrying Interstate Commerce.**—Testimony is an employe's action against common carrier by railroad under the federal statute, who was in-

8. *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885, 7 N. C. C. A. 622.

A switching foreman was employed in making up a train in a railroad yard at Oelwein, Iowa. The train was destined to a point in Minnesota and some of the cars were to be set out at stations in Iowa. Some of the cars destined for points in Iowa originated in Iowa and some came from points in Illinois. Some of the cars destined to Minnesota originated in Iowa and some came from Illinois. All these cars, both intrastate and interstate, were being switched into the train at the time the foreman was killed while engaged in such work. The court held that these facts were sufficient to show that the foreman was engaged in interstate commerce as a matter of law. *Crandall v. Chicago & G. W. R. Co.*, — Minn. —, 150 N. W. 165.

jured while on a train running between two points in the same state, that it was customary for train men to mark on cars the number or the name of the station to which they were destined, that one of the cars had marked on it with chalk the name of a town in an adjoining state on the defendant's line of railway was not sufficient to show that the car was being moved from a point in one state to a point in another.<sup>9</sup> Discussing the sufficiency of such evidence

9. *Barker v. Kansas City, M. & O. Ry. Co.*, — Kan. —, 88 Kan. 767, 129 Pac. 1151.

The Supreme Court of Kansas on the second appeal in the case of *Barker v. Kansas City, M. & O. Ry. Co.* (— Kan. —, 146 Pac. 358, decided Feb. 6, 1915), held that a fireman on a switch engine hauling cars of company coal between two points in the same state, which was to be used later in firing engines pulling interstate trains was not engaged in interstate commerce. This decision seems to be in conflict with cases decided by other courts (§ 37, *supra*). In holding that the fireman was not engaged in interstate commerce, the court on the second appeal, said: "The plaintiff was the fireman of a switch engine. The crew was ordered to take the engine from Altus, Oklahoma, where it was in use, to Clinton, Oklahoma, to have some work done upon it. The day following, on the return trip from Clinton to Altus, the derailment occurred which caused the plaintiff's injuries, and at this time the train consisted, besides the engine, of one water car and nine cars loaded with coal. The defendant concedes that it was engaged generally in the business of transporting interstate commerce on its line of railway between Altus, Oklahoma, and Wichita, Kansas, but denies that in hauling the coal or train in question it was transporting interstate commerce. Stated in another way, the contention is that the work plaintiff was doing at the time of the injury had no real and substantial connection with interstate commerce. On the second trial the jury found that the destination of the switch engine and train at the time the injury occurred was Altus, Oklahoma; that the destination of the water car was Dill City, Oklahoma; that the train started from Clinton, Oklahoma; that the origin of the nine cars of coal was McCurtain, Oklahoma, and their destination, Altus, Oklahoma; consigned to N. J. O'Brien, Vice President of the Kansas City, M. & O. Ry. Co. of Texas, for use on engines running









the court, in the case cited in the notes, said: "But, assuming that at some time not shown and, by some person unknown, these words were upon the car in question, it could hardly be said that the natural, fair and reasonable inference to be drawn therefrom is that at the time in question this car was actually in process of transportation to a point in another state, and especially so when this was made the vital and determining question in the case." Evidence

south of Altus into Texas, and for engines running north into Oklahoma. Plaintiff testified that they were taking the coal to Altus for use on engines running north into Oklahoma and south into Texas; that there was a coal yard at Altus kept by the company; that coal of this kind taken to Altus would be scooped out of the cars onto the tenders of the engines. The decisions as to what will constitute interstate commerce in a case like this were quite fully reviewed in a former opinion (88 Kans. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121), and it will not be necessary to refer to them at length here. The findings in the present case are conclusive, and show that the movement of the coal from McCurtain to a consignee at Altus, Oklahoma, was intrastate. Of course, cases where the intention of the shipper when the property was first started in transit was to forward it to a foreign destination have no application to the facts of the present case. The cars were consigned to Altus, Oklahoma, and there the shipment ended. The most that can be said is that the plaintiff was handling coal which at a later date might become a part of an instrumentality used in the transportation of interstate commerce. But this fact alone could not make him an employe engaged in interstate commerce. The several cars of coal being transported at the time plaintiff received his injuries were to be unloaded at Altus, their bulk broken and some portions thereof afterwards were to be used for fuel on engines running into other states. The situation would be no different if, instead of coal, the shipment had consisted of articles intended to be used in the repair of a locomotive running from Altus into Texas. In such a case the mere fact that the consignee intended to attach articles to a locomotive engaged in interstate commerce would not make the shipment between Clinton, Oklahoma, and Altus, Oklahoma, interstate in character." *Barker v. Kansas City, M. & O. Ry. Co.*, — Kan. —, 146 Pac. 358.

that an employe was a watchman on an engine pulling a train between two points in the same state, was held not to be sufficient to show that the watchman while so engaged, was employed in interstate commerce, as the court will not take judicial notice that a railroad is engaged in interstate commerce.<sup>10</sup> In the case cited the court said: "While this court may properly, in certain cases, take judicial notice of the fact that anyone of the many great trunk lines of railway extending through the various states is engaged in interstate commerce, yet the fact is equally as notorious and as much the subject of judicial notices that every such railway is also engaged in intrastate traffic; and clearly it is not a matter of such general knowledge as to dispense with proof that any specific portion of the equipment or any particular employe of such railway is engaged in interstate, rather than intrastate commerce at any precise time or place. The only evidence in this case as to the character of commerce in which defendant and deceased were engaged, is that the engine which was being watched by, and exploded and caused the death of, the said John M. McBee was used in hauling a passenger train between points in this state." That the duties of a brakeman working for a common carrier by railroad generally consisting in assisting in the movement of cars containing both intrastate and interstate commerce, is not sufficient to create a jury issue on the question as to whether he was employed in interstate commerce, while assisting in shifting cars at the time of the

10. *Chicago, R. I. & P. Ry. Co. v. McBee*, — Okla. —, 145 Pac. 331.





accident, the evidence being silent as to the character of freight with which the cars on which he was working at the time of the accident, were loaded, what disposition had been made of the cars after their arrival and what kind of shipment, if any, they contained, and their destination.<sup>11</sup>

11. *Hench v. Pennsylvania R. Co.*, — Pa. —, 91 Atl. 1056.

## CHAPTER XIII

### MATTERS OF PRACTICE UNDER FEDERAL ACT

- § 172. At What State of Proceedings, Motion to Elect Should Be Sustained—Practical Considerations.
- § 173. Motions to Elect Under Iowa Statute in Actions Under Federal Act.
- § 174. Instances Where Motion to Elect Should Have Been Sustained Before Trial.
- § 175. Widow Suing in Her Own Name in One Suit and as Administratrix in Another, Cannot Be Compelled to Elect.
- § 176. Verdicts by Less Than Twelve Jurors, When Permissible Under State Law, Valid in Actions Under Federal Statute.
- § 177. When Suit Under State Law Is *Res Adjudicata*.
- § 178. Errors in Actions Under Federal Act Held Harmless on Appeal.
- § 179. Plaintiff in Action Under Federal Act May Sue as a Poor Person in United States Courts, When.

**§ 172. At What Stage of Proceedings, Motion to Elect Should Be Sustained—Practical Considerations.**—When the plaintiff pleads a cause of action under the state law in one count and under the federal law in another count, whether a motion to elect should be sustained before the trial, or at the close of the plaintiff's evidence, or upon the conclusion of all the evidence introduced, or should be denied altogether, presents some questions of difficulty to trial courts. Counsel representing railroads have often insisted with some show of reason that since the plaintiff has alleged facts in his petition showing the federal act applicable, the remedy therein provided is exclusive







and therefore a motion to elect should be sustained before proceeding to trial. Another reason advanced for such action by trial courts is, that the defenses under the two laws are sometimes quite dissimilar so that if compelled to go to trial under both counts, a hardship will result. But, on the other hand, as the plaintiff is permitted to plead the two laws alternatively he ought to be permitted to have some of the practical benefits resulting from such a rule. To force him to elect before the trial, would practically be no benefit to him as the main purpose of stating a case alternatively is to have a pleading to fit the proof, whatever it might be. Sometimes the true facts as to such matters are not in the possession of the plaintiff while the defendant has the absolute means of knowing whether a train, for instance, has intrastate shipments or interstate shipments. It may be that under all the facts after the evidence is in, it is a doubtful question as to what kind of commerce the plaintiff was employed in, that is, the facts may be such that different conclusions may be drawn therefrom by reasonable men. For instance, a question of fact might arise as to whether a train or a "drag" on which an employe was working, contained interstate shipments, some witnesses denying and others affirming that to be true. In such a contingency the question whether the plaintiff was engaged in interstate or intrastate commerce is not a question of law for the court but a question of fact to be submitted to the jury under proper instructions<sup>1</sup> and it would be an injustice to the plaintiff to

1. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591,

require him to elect on which cause of action he would submit his case, even at the close of all the evidence. On the other hand, it may be that the facts stated in the petition as to such employment, are such that the court can determine the question as a matter of law or if at the close of the plaintiff's evidence, or at the close of all the evidence in the case, it appears as a matter of law that the plaintiff was employed in either one or the other kind of commerce, the trial court should then sustain a motion to elect if presented. No hard and fast rule can be laid down as to when a motion to elect should be sustained. Trial courts should take into consideration the rights and difficulties of both parties, and rule, without unnecessarily placing either party at a disadvantage in enforcing or protecting his rights.

**§ 173. Motions to Elect Under Iowa Statute in Actions Under Federal Act.**—The question as to when a motion to elect should be sustained, is a question of practice under the rules of the courts

6 N. C. C. A. 194n, Ann. Cas. 1914 C 159n, reversing the same case on other grounds reported in 156 N. C. 496; *Southern P. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885; *Atkinson v. Bullard*, — Ga. —, 6 N. C. C. A. 80n, 183n, 80 S. E. 220.

“As already indicated, the fact that plaintiff was employed in interstate commerce was established. Such a question is usually a mixed question of law and fact, and often one more of law than of fact. The facts involved in such a question are usually simple. When they appear in the record without material dispute, it devolves upon the court to construe the federal act in its application thereto. So in this case sufficient facts are undisputed to bring the case within the federal act. The jury, therefore, had nothing to do with the question. The court could properly have given a peremptory instruction thereon.” *Pelton v. Illinois C. R. Co.*, — Ia. —, 150 N. W. 236.





of the states where the case is pending. As to matters of procedure under the federal act, the decisions of the national courts do not control but the question is a matter governed by state law.<sup>2</sup> A statute of the state of Iowa provides (§ 3545, Iowa Code, 1897): "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same right, and if action on all may be brought and tried in that county, may be joined in the same petition; but the court may direct all or any portion of the issues joined to be tried separately, and may determine the order thereof." In an action pending in a federal district court in the state of Iowa, the defendant, after the plaintiff had pleaded a cause of action under the state law in one count and under the federal act in another count, filed before trial the motion requiring the plaintiff to elect upon which cause of action he would proceed to trial.<sup>3</sup> The court held that under the statute mentioned, a plaintiff who alleges a cause of action under the state law in one count and under the federal act in another count may, if the evidence is doubtful, submit both to the jury and may recover under whichever statute appears from the evidence to be

2. *McAdow v. Kansas City W. Ry. Co.*, — Mo. App. —, 6 N. C. C. A. 76n, 206n, 233n, 164 S. W. 188; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 6 N. C. C. A. 224; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 58 L. Ed. 860.

3. *Bankson v. Illinois C. R. Co.*, 196 Fed. 171. Where an employe brought a suit under the state law, and later under the federal statute because of doubt as to which afforded him a remedy, the cases should be consolidated for one trial. *Tinkham v. Boston & M. R. Co.*, 77 N. H. 11, 6 N. C. C. A. 81n, 233n.



applicable. In passing upon the motion, Judge Reed said: "It may be that at the time of filing her petition she knows the acts of negligence upon which she relies for recovery; but whether they authorize a recovery under the Employers' Liability Act of Congress, or the general law of negligence, she may not then be able to determine; and the facts may be of such a character that they would have to be submitted to the jury to determine whether the injury to the deceased occurred while he was engaged in interstate commerce, or while he was not so engaged. It may be that at the close of the testimony it will clearly appear that he was or was not engaged in interstate commerce, and that the court may then determine the question as one of law, or they may be such as to require the submission of the question to the jury to determine that question. If the defendant through its own neglect or some of its employes has inflicted an injury upon the deceased which caused his death, and it is legally liable therefor, whether that injury was inflicted while the decedent was engaged in interstate commerce, or while he was not so engaged, the defendant should respond therefor; but, of course, it can be required to respond but once, and whether or not the recovery shall be under the Employers' Liability Act of Congress for the benefit of the dependent relatives of the deceased, if there are any, or shall be for the benefit of his estate, the defendant is not particularly interested, except as this may bear on the amount of the recovery."

**§ 174. Instances Where Motion to Elect Should Have Been Sustained Before Trial.**—If a state law





differs so radically from the federal statute as to certain defenses, the plaintiff will be required to elect upon which cause of action he will proceed to trial. Where under a state statute, a *prima facie* case of negligence on the part of the employer was made out, when any defect or unsafe condition was shown, while under the federal act the plaintiff must show negligence under the ordinary rules applicable, if the petition states a cause of action under the two laws in separate counts, a motion to elect, if presented before the trial, should be then sustained.<sup>4</sup> In another action for the death of a brakeman, it was alleged in the petition, that the decedent was engaged in interstate commerce or intrastate commerce, the plaintiff did not know which. The deceased was killed, it was alleged, as the direct result of one or more of the acts of negligence charged in the petition. The court held that the petition was not sustainable under a state statute authorizing alternative allegations, since the rights and liabilities of the parties under the state law and the federal act are essentially different, and hence the defendant was entitled to compel the plaintiff to elect on which cause of action she would proceed.<sup>5</sup> In another case, in which the injured servant alleged a cause of action under the state law in one count and under the federal act in another, it was held that the motion to elect should have been sustained, but that the improper denial of the defendant's motion to compel

4. *South Covington & C. S. R. Co. v. Finan's Adm'x*, 153 Ky. 340.

5. *Louisville & N. R. Co. v. Strange's Adm'x*, 156 Ky. 439, 6 N. C. C. A. 75n, 82, 83n, 185n.

an election was harmless, where the court ruled at the close of all the evidence that the case did not come within the federal act.<sup>6</sup> In so holding that the error was harmless the court said in that case: "But this error (failing to sustain motion to elect before trial) was not in this case prejudicial to the railroad company and in cases like this the failure to require the plaintiff to elect will not be reversible error unless it appears that the substantial rights of the defendant were prejudiced by the ruling of the court. In the *Strange* case, we pointed out the difference between the federal act and the common law and the reason why it was prejudicial error in that case not to have sustained a motion to elect, but the reasons that made it prejudicial not to sustain the motion in that case do not appear in this one."

Plaintiff, a widow of an employe killed in Missouri, brought suit in an Iowa state court basing her cause of action upon the Missouri law which provides that in case of death, the widow may recover without the appointment of an administrator. Defendant then filed an answer alleging that the cause of action was governed by the federal act. Later, the plaintiff as administratrix of the estate of her husband, filed a new suit under the federal act and the defendant's answer in that case was a general denial. On motion the two causes were consolidated and tried together. It does not appear from the report of the case whether the consolidation of the two actions, in which the widow was plaintiff in one suit in her in-

6. *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 4 N. C. C. A. 227n, 5 N. C. C. A. 771n.







dividual capacity and plaintiff in the other suit as administratrix, were consolidated by consent. At the close of plaintiff's evidence a motion to require plaintiff to elect which cause of action she would prosecute, was overruled, but at the close of the evidence, the court on defendant's motion required the plaintiff to elect and she chose to proceed with the action under the state law. The appellate court held that, under the facts, the cause of action was governed by the federal statute and ordered the cause reversed for that reason for a new trial.<sup>7</sup>

**§ 175. Widow Suing in Her Own Name in One Suit and as Administratrix in Another, Cannot Be Compelled to Elect.**—Although a widow brings one suit in her own name against a railroad company for the death of her husband under the laws of the state, and subsequently brings another action as administratrix under the federal act, the bringing of the action under the federal act does not have the effect of superseding the action under the state law, so as to deprive the court of jurisdiction to hear the action under the state law, during the pendency of the suit under the federal act. In jurisdictions where the state statute permits such suits to be consolidated, tried and prosecuted together, if there is an issue of fact, not of law, as to whether the deceased was engaged in intrastate or interstate commerce, no election will be compelled even at the close of the evidence, but of course there can only be a recovery under one law, as the jury may find the facts to be,

7. *Armbruster v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 6 N. C. C. A. 195n, 147 N. W. 337.

relative to employment at the time of the injury.<sup>8</sup> The Supreme Judicial Court of Massachusetts expressly disapproved the reasoning in the Kentucky cases cited in the foregoing paragraph and held that a widow should not be compelled to elect, although suing under the state law in one suit and as administratrix under the federal law in another suit. The argument of the court in this case is so forceful, clear and concise that it would detract from its strength and beauty for a commentator to attempt to condense it and we reproduce it: "But we are of opinion that the ruling was wrong. The federal act in the field covered by it, supersedes all state statutes. As to matters within the scope of the federal power, legislation by Congress is supreme. So long as Congress had not acted as to liability for injuries received by employes of railroads while engaged in interstate commerce, legislation by the states touching that subject, being within the police power, was valid. But when Congress exerted its jurisdiction to regulate in this respect commerce between the states, state statutes previously operative in that sphere yielded to its paramount and exclusive power. (Citing cases.) The federal act has no greater extent. It does not undertake to affect the force of the state statute in its appropriate sphere. The state law is as supreme and exclusive in its application to intrastate commerce as is the federal law to interstate commerce. If the employe of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's

8. *Corbett v. Boston & M. R. R.*, — Mass. —, 107 N. E. 60.





liability is controlled and must be determined solely by the federal law; if in the latter service, such liability rests wholly upon the state law (citing case). The facts and not the pleadings determine whether the wrong done in any given case gives a right to recover under the federal or the state statute. The allegations in the plaintiff's declarations in these two actions do not constitute the test whether the jurisdiction of the court is under the federal or state statute. These simply are the basis for a judicial inquiry into the facts which alone can determine that question. It is a familiar principle that, where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound, so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril (citing cases). This rule has been followed frequently in actions where it was doubtful whether the remedy of the plaintiff was under our Employers' Liability Act or at common law (citing cases). It is equally applicable to the cases at bar. The principle is not changed in any material respect, because the question relates to remedies afforded by the statutes of different sovereign powers, each exclusive within its own domain. The relief is sought in the same forum, for the state court has jurisdiction of the cause of action,

whichever statute may be controlling (citing cases). There are strong practical considerations in the administration of justice which lead to the same result. It oftentimes would be a great hardship upon the parties to compel them to try out first the question whether the federal act applies, and, if it in the end shall be decided that it does not, then to test by further litigation their rights under the state statute. The short period of limitations provided in each act often might expire before a final decision could be reached. If adverse to the plaintiff on the ground of error in the form of relief sought, he thus might be barred from a just recovery. Although both the federal and state statutes as to amendments are liberal (Rev. St. U. S. § 954; R. L. c. 173, § 48) and are liberally interpreted in cases of this sort (Missouri, Kansas & Texas Ry. v. Wulf, 226 U. S. 570, 33 Supt. Ct. 135, 57 L. Ed. 355 (6 N. C. C. A. 230n, 237n), Ann. Cas. 1914 B 134; Herlihy v. Little, 200 Mass. 284, 86 N. E. 294), nevertheless the allowance of such amendments rests commonly in the sound discretion of the trial judge and is not subject to revision on exceptions. As it is not a matter of right, substantial interests might be lost through no fault of a plaintiff who constantly had been alert in his own behalf. The federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. Illinois Central R. R. v. Behrens, 233 U. S. 473, 478, 34 Sup. Ct. 646, 58 L. Ed. 1051 (6 N. C. C. A. 189n), Ann. Cas. 1914 C 163. Whether a railroad employe is engaged in interstate or intra-







state commerce often involves legal discrimination of great nicety about which even the justices of the highest court are not always in harmony (citing cases). It would be a saving of expense both to the parties and to the commonwealth if the two actions could be prosecuted together, so that by one trial the facts could be ascertained and the causes ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all phases, than to require two distinct and successive inquiries before separate tribunals where only a single aspect of the incident could be open to investigation at one time. There are important points of dissimilarity between the rights conferred and the burdens imposed under the two statutes. The rules of evidence may be different. The principles of law by which liability may be established under the two statutes are somewhat divergent. Difficulties will be presented in the trial which will require great care and a strong grasp by the presiding judge, and demand careful discrimination by jurors. But these are not insurmountable obstacles, nor do they appear to counterbalance the advantages which will accrue in permitting a joint prosecution of the two causes in appropriate instances.”<sup>9</sup>

9. *Corbett v. Boston & M. R. R.*, — Mass. —, 107 N. E. 60.

**§ 176. Verdicts by Less Than Twelve Jurors, When Permissible Under State Law, Valid in Actions Under Federal Statute.**—Section 6 of the Federal Employers' Liability Act (one of the 1910 amendments) provides that the "jurisdiction of courts of the United States under this act shall be concurrent to that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."<sup>10</sup> The seventh amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Construing this provision of the Constitution, the courts have uniformly held that the jury trial contemplated by this section is the right to a trial by a jury of twelve men, whose findings shall be unanimous.<sup>11</sup> It has, however, been held without dissent, that this seventh amendment does not apply to the states, and that a state is not prohibited by the federal Constitution from providing for a jury of less than twelve men or for a verdict

10. Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291, Fed. Stat. Ann. 1912 Supp. p. 335.

11. *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079; *Rasmussen v. United States*, 197 U. S. 516, 49 L. Ed. 862; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801.





that is not unanimous.<sup>12</sup> Nor is a trial under a state statute dispensing with the feature of unanimity or abridging the number of jurors, a denial of "due process" within the meaning of the fourteenth amendment to the Constitution of the United States.<sup>13</sup> The constitutions and the statutes of several of the states provide that in civil cases, a verdict may be returned by less than twelve men or by three-fourths or five-sixths of the jurors concurring in the verdict. It has been urged before at least three courts, that in actions prosecuted in the state courts under the Federal Employers' Liability Act the provision of the Constitution of the United States requiring a unanimous verdict by twelve men applies in state courts for the reason that the action is under an Act of Congress. The courts have unanimously held that the verdict in such cases is not controlled by the provision of the national Constitution but by the laws of the state where the suit is pending. The fact that the suit is under a federal statute makes no difference, for the reason, as to all matters of procedure, the state law is controlling.<sup>14</sup> In the *Kelley* case, cited, the Court of Appeals of

12. *Edwards v. Elliott*, 21 Wall. (U. S.) 532, 557, 22 L. Ed. 487; *Barron v. Baltimore*, 7 Pet. (U. S.) 243, 8 L. Ed. 464; *Twitchell v. Pennsylvania*, 7 Wall. (U. S.) 321, 19 L. Ed. 223; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Maxwell v. Dow*, 176 U. S. 581, 44 L. Ed. 597.

13. *Hurtado v. California*, 110 U. S. 517, 28 L. Ed. 232; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616.

14. *Chesapeake & O. Ry. Co. v. Kelly's Adm'x*, — Ky. —, 171 S. W. 185; s. c., — Ky. —, 171 S. W. 182; s. c., 160 Ky. 296; *Gibson v. Bellingham & N. Ry. Co.*, 213 Fed. 488; *Winters v. Minneapolis & St. L. R. Co.*, — Minn. —, 6 N. C. C. A. 78n, 201n, 148 N. W. 106.

Kentucky said: "It seems to us that, when state courts are given jurisdiction to hear and determine causes of action created by federal legislation, they may exercise this jurisdiction according to the practice and procedure of the forum and under the jury systems adopted, subject, of course, to such conditions as Congress may attach to the legislation; and Congress did not, in the legislation here in question, attempt to attach any conditions to the practice and procedure through which the jurisdiction of state courts of competent jurisdiction might be exercised in the enforcement of rights arising under this act."<sup>15</sup>

**§ 177. When Suit Under State Law Is Res Adjudicata.**—Unless there is an identity of parties and of subject matter, a suit prosecuted and determined under the state law, is not a bar to a subsequent suit under the federal act. A judgment against the widow who sued in her individual capacity for herself and her children to recover damages from an interstate carrier for the death of her husband while in its employ, which was prosecuted and tried under the state law, and which provided that there should be no recovery for the negligence of a fellow servant, is not a bar to a subsequent suit by her as administratrix, for the benefit of herself and the same children against the carrier under the federal act in which recovery was asked, because of the negli-

15. The decisions of these courts are no doubt correct under the following controlling decisions of the United States Supreme Court: *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 19 Ann. Cas. 392, affirmed in 219 U. S. 209, 55 L. Ed. 183.







gence of such fellow servant.<sup>16</sup> Mr. Justice Day, speaking for the court in that case, said: "To work an estoppel the first proceeding and judgment must be a bar to the second one, because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury by the negligence of the fellow servants was not involved in or concluded by the first suit. Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. *Brown v. Fletcher*, 210 U. S. 82, 52 L. Ed. 966, 28 Sup. Ct. Rep. 702; *Ingersoll v. Coram*, 211 U. S. 335, 53 L. Ed. 208, 29 Sup. Ct. Rep. 92. The circuit court of appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentially the same in both actions (the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administra-

16. *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. Ed. 586.

trix, is for the benefit of herself and children); and held that, except in mere form, the actions were for the benefit of the same persons, and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical, and would have been curable by amendment. This conclusion was reached before this court announced its decision in *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. Rep. 603. That action was brought under the Federal Employers' Liability Act by the widow and son of the decedent, and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the circuit court of appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention, and held that Congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative; and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the *Birch* case there was not that identity of parties in the former action by the widow and the present case, properly brought by the administrator under the





Employers' Liability Act, which renders the former suit and judgment a bar to the present action."

**§ 178. Errors in Actions Under Federal Act Held Harmless on Appeal.**—In all actions under the federal act where there are more than one beneficiary, the verdict should apportion the sum due each of them but where no instructions requiring the jury so to do were asked and no objection was made or exception taken to the verdict, the error has been held to be harmless on appeal.<sup>17</sup> A trial court in an action under the federal act instructed the jury on the measure of damages to a wife and dependent child that they should include the value of the support and "protection" they would have secured from the deceased had he lived. The court held that the word "protection" was used in a pecuniary sense in the instruction and that even if not so understood by the jury, the error under a state statute prohibiting a reversal for harmless errors, was not such as to justify a reversal.<sup>18</sup> In an action for the death of a fireman prosecuted under the Federal Employers' Liability Act, the trial court instructed the jury that if an employe is injured through defective instrumentalities it is prima facie evidence of the company's negligence and that the railroad company "assumes the burden" of showing that it exercised ordinary care in furnishing the appliances. The Supreme Court of the United States in passing on

17. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156; *Southern Ry. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360; *Yazoo & M. V. R. Co. v. Wright*, 125 C. C. A. 25, 207 Fed. 281.

18. *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 6 N. C. C. A. 78n, 94n, 232n, 451n.



this instruction held that it was not such an error as to justify a reversal where the court's charge in another clause plainly stated to the jury that the burden of proving negligence was on the plaintiff throughout the case.<sup>19</sup> An instruction in an action under the federal act on the effect of contributory negligence in which the court charged the jury that they should "deduct" a reasonable amount for the plaintiff's contributory negligence instead of using the word "diminished," found in the federal statute, was held not to be an error.<sup>20</sup>

**§ 179. Plaintiff in Action Under Federal Act May Sue as a Poor Person in United States Courts, When.**

—In any action under the Federal Employers' Liability Act prosecuted in the courts of the United States the plaintiff, by order of court, may commence and prosecute the action without being required to prepay fees and costs, upon filing in court a statement under oath in writing that because of his poverty he is unable to pay the costs of the suit or to give security for the same and that he believes he is entitled to the redress he seeks by the action and setting forth briefly the nature of his alleged cause of action.<sup>21</sup> The Act of Congress permitting a person to sue as poor person in the federal courts is as follows: "That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States,

19. *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 58 L. Ed. 860.

20. *Tilgham v. Seaboard A. L. Ry. Co.*, — N. C. —, 83 S. E. 315.

21. Act of Congress approved June 25, 1910, c. 435, Fed. Stat. Ann. 1912 Supp. p. 45.





may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action or appeal."



## APPENDIX A

### FEDERAL EMPLOYERS' LIABILITY ACT OF 1906

An Act Relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employes, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be dimin-

ished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employes under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved, June 11, 1906. 34 U. S. Stat. at L. 232, e, 3073.



## APPENDIX B

### FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

An Act Relating to the liability of common carriers by railroad to their employes in certain cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* SECTION 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

SEC. 2. Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case

of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

SEC. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under

or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

SEC. 7. The term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. Nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled "An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes," approved June 11, 1906.

Approved, April 22, 1908. 35 U. S. Stat. at L. 65 c. 149.

## APPENDIX C

### FEDERAL EMPLOYERS' LIABILITY ACT, AMENDMENTS OF 1910

An Act To amend an Act entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That an Act entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

SEC. 6. (As amended by act of April 5, 1910.) No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

SEC. 2. That said Act be further amended by adding the following section as section nine of said Act:

SEC. 9. Any right of action given by this act to a person

suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury.

Approved, April 5, 1910.

## APPENDIX D

### REPORT OF JUDICIARY COMMITTEE OF HOUSE ON FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

The Committee on the Judiciary, to whom was referred House Bill 20310, have had the same under consideration, and report it to the House with a recommendation that it pass.

This bill relates to common carriers by railroad engaged in interstate and foreign commerce and in commerce in the District of Columbia, the Territories, the Canal Zone, and other possessions of the United States. It is intended in its scope to cover all commerce to which the regulative power of Congress extends.

The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employes in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employe, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employe for an injury caused by the negligence of a co-employe; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury. The amount of the recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes each party responsible for his own negligence, and requires each to bear the burden thereof. The bill also provides that, to the extent that any contract, rule, or regulation seeks to exempt



the employer from liability created by this act, to that extent such contract, rule or regulation shall be void.

Many of the States have already changed the common-law rule in these particulars, and by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employes.

Sections 1 and 2 of this bill provide that common carriers by railroad, engaged in interstate and foreign commerce, in commerce in the District of Columbia, the Territories, the Panama Canal Zone, and other possessions of the United States, shall be liable to its employes for personal injuries resulting from its negligence or by reason of any defect or insufficiency due to its negligence in its roads, equipment, or methods. It is not a new departure, but rather goes back to the old law which made the master liable for injury occasioned by the negligence of his servant, either to a co-servant or to a third person.

The doctrine of fellow-servant was first enunciated in England in 1837, and since that time it has been generally followed in that country and this, except where abrogated or modified by statute. Whatever reason may have existed for the doctrine at the time it was first announced, it can not be said to exist now, under modern methods of commerce by railroad. It is possible that a century ago, under industrial methods and systems as they then existed, co-employes could have some influence over each other tending to their personal safety. It is possible that they could know something of the habits and characteristics of each other. Under present industrial methods and systems this can not be true. Then they worked with simple tools and were closely associated with each other in their work. Now they work with powerful and complex machinery, with widely diversified duties, and are distributed over larger areas and often widely separated from each other. Under present methods, personal injuries have become a prodigious burden to the employes engaged in our industrial and commercial systems.



The master should be made wholly responsible for injury to the servant by reason of the negligence of a co-servant. He exercises the authority of choosing the employes and if made responsible for their acts while in line of duty he will be induced to exercise the highest degree of care in selecting competent and careful persons and will feel bound at all times to exercise over employes an authority and influence which will compel the highest degree of care on their part for the safety of each other in the performance of their duties.

These sections make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and other appliances used in the operation of railroads. Over these things the employe has absolutely no authority. The employer has complete authority over them, both in their construction and in their maintenance. It is a very hard rule, indeed, to compel men, who by the exigencies and necessities of life are bound to labor, to assume the risks and hazards of the employment, when these risks and hazards could be greatly lessened by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employe does his work. We believe that a strict rule of liability of the employer to the employe for injuries received for defective machinery will greatly lessen personal injuries on that account. The common-law rules of fellow-servants and assumption of risk still prevail in many of the States, and without any apparent good reason. In recent years many of the countries of Europe have adopted new rules of liability, which greatly relieve the harshness of the common law as it still exists in some of the States.

In 1888 England passed an act which abolished the doctrine of fellow-servant with reference to the operation of railroad trains, and in 1897 it extended this law to apply to many of the hazardous employments of the country.

For many years the doctrine in Germany has been yielding step by step to better rules, until for the last quarter of

a century it does not apply to any of the hazardous occupations.

In 1869 Austria passed a law making railroad companies liable for all injuries to their employes except where the injury was due to the victim's own negligence.

The Code Napoleon made the employer answerable for all injuries received by his workmen, and this code is still in force in Belgium and Holland.

Other European countries have from time to time made laws fixing the liability of the master for damages caused by the negligent act of his servant.

Many of the States have passed laws modifying the doctrine as changing conditions required it and justice to the employe demanded it.

Alabama in 1885 eliminated the doctrine so far as it relates to railroads, and in other particulars.

Arkansas in 1893 qualified the doctrine as to railroad employment.

Georgia in 1856 entirely abolished the doctrine as to railroads.

Iowa abolished it as to train operatives in 1862.

Kansas did the same thing in 1874.

The latest statute in Wisconsin on the subject abolished the fellow-servant doctrine as to employes actually engaged in operating trains.

Minnesota did the same thing in 1887.

Florida, Ohio, Mississippi, and Texas have changed the doctrine to the advantage of the employe.

North Carolina, North Dakota, and Massachusetts have practically eliminated the doctrine as regards the operation of railroad trains.

Colorado in 1901 abolished the doctrine in toto.

Other States have either abolished it or modified it as regards the operation of railroads.

As compared with the law now in force in other countries and in many of the States, the changes made in the law of fellow-servant by this bill are not radical. The doctrine as

regards the hazardous occupations is being relegated everywhere.

A Federal Statute of this character will supplant the numerous State Statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States.

It is thought that the adoption of the rule, as provided in this section, will be conducive to greater care in the operation of railroads. As it is now, where the doctrine of fellow-servant is in force, no one is responsible for the injury or death of an employe if caused by the carelessness of a co-employe. The co-servant who is guilty of negligence resulting in the injury may be liable, but as a rule he is not responsible, and hence the injury is not compensated. The employe is not held by the employer to such strict rules of caution for the safety of his co-employe, because the employer is not bound to pay the damages in case of injury. If he were held liable for damages for every injury occasioned by the negligence of his servant, he would impose the same strict rules for the safety of his employes as he does for the safety of passengers and strangers. He will make the employment of his servant and his retention in the service dependent upon the exercise of higher care, and this will be the stronger inducement to the employe to act with a higher regard for the safety of his fellow-workmen.

Section 3 is a modification of the common-law rule of contributory negligence. It does not abolish the law. Under its provisions contributory negligence still bars a recovery for personal injury so far as the injury is due to the contributory negligence of the employe, but entitles the employe to recover for the injury so far as it is due to the negligence of the employer. It differs from the Act passed by Congress in June, 1906, on this point, in this: That law provided that contributory negligence did not bar a recovery if the negligence of the employe was slight and

that of the employer was gross in comparison. That law modified the common-law rule of contributory negligence and also contained a modification of the common-law doctrine of comparative negligence. We are unable to see any justification whatever in the common-law doctrine of comparative negligence anywhere. It is the only rule of negligence that permits an employe to recover damages for injury to which his own negligence contributed. Comparative negligence is absolutely wrong in principle, for the reason that it permits the employe to recover full damages for injury, even though his own negligence contributed to it. It is true, as the law states it, he can only recover damages when his contributory negligence is slight and that of the employer is gross in comparison. But that rule does not undertake to diminish the verdict in proportion to the negligence of the employe. This may be said in behalf of the doctrine of contributory negligence in its common-law purity, and it is the only reason, so far as we know, that has ever been assigned for its existence: It tends to make the employe exercise a higher degree of care for his own safety.

If that is a good reason for the existence of that rule, then we believe that Section 3 of this bill is a very great improvement on that doctrine, for the reason that it imposes the burden of the employer's negligence on the employer, and he will thus be induced to exercise higher care in the selection of his employes, and in other ways, for the safety of persons in his employment. If the law imposes on the employe the burden of his own negligence, that is certainly sufficient, and that is what this section seeks to do, and it also seeks to impose upon the employer the burden of his negligence. It provides that contributory negligence shall not bar a recovery for injury due to the negligence of the employer. It provides that the jury shall diminish the damages suffered by the injured employe in proportion to the amount of negligence attributable to such employe.

It is urged by some that such a provision is impracticable of administration and that juries will not divide the damages in accordance with the negligence committed by each.



The same objection can be urged against the provision of the bill passed by Congress in 1906, which provided that only slight negligence should not bar a recovery, but that the jury should diminish damages in proportion to such slight negligence. Under that provision the jury would have the same difficulty, if any, in apportioning the damages according to the negligence of each party. We submit, further, that this section of the bill is free from the very unjust principle contained in the common-law doctrine of comparative negligence which allowed the employe to recover full damages for injury to which his own negligence contributed in some degree. It is not a just criticism of a law, conceding the righteousness of its principles, to say that it is impracticable of administration. We submit that the principle in this section is ideal justice, against which no fair argument can be made. It is better that legislatures pass just and fair laws, even though they may be difficult of administration by the courts, rather than to pass unjust and unfair laws because they may be more easily administered by the courts. Courts ought not to be compelled to administer the common-law doctrine of contributory negligence, which puts upon the employe the whole burden of negligence, even though his negligence was slight and that of the employer was gross. That law might to some extent induce higher care on the part of the employe, but in the same degree, and for the same reason, it induces the employer to have less regard and less care for the safety of his employes.

It is urged that juries under this law will wholly ignore the negligence committed by the employe and charge all the injury to the negligence of the employer. We do not believe that this will be the result of the administration of this section. We believe it will appeal to juries as eminently just and they will undertake to enforce it literally to the best of their skill. If juries under the common-law rule of contributory negligence have been disposed to assess damages in spite of the fact that the defendant contributed to the injury by his own negligence, it may be said that the

jury recognizes the injustice of the law and undertakes to correct it by what they consider a just and righteous verdict. There is nothing in this law that will induce such a sentiment in the minds of the jury, but it will appeal to them as the true principle, and, in our judgment, they will seek to apply it fairly in the courts.

Beach, in his work on contributory Negligence, page 136, comments on the law as provided in this section as follows:

“Much may be said in favor of the rule which counts the plaintiff’s negligence in mitigation of the damages in those cases which frequently arise, wherein, on one hand, a real injury has been suffered by the plaintiff by reason of the culpable negligence of the defendant, and yet, where, on the other hand, the plaintiff’s conduct was such as to some extent contribute to the injury, but in so small a degree that to impose upon him the entire loss seems not to take a just account of the defendant’s negligence. In those cases, which may be denominated ‘hard cases,’ the Georgia and Tennessee rule in mitigation of damages without necessarily sacrificing the principle upon which the law as to contributory negligence rests is a rule against which, in respect of justice and humanity, nothing can be said. Where the severity of the general rule might refuse the plaintiff any remedy whatever, as the sheer injustice of the rule, as laid down in *Davis v. Mann*, would impose the whole liability upon the defendant, it is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff’s misconduct, but does not decline to impose them at all, would work substantial justice between the parties.”

Shearman and Redfield on the Law of Negligence, fifth edition, page 158, in speaking of this rule, say:

“This is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice, if juries could be trusted to act upon it.”

The United States has adhered much closer to the common-law doctrine of contributory negligence than the leading countries of Europe. The laws of England, Germany, and

Italy go much further to discharge the employe from the responsibility of his own act than does the common-law doctrine of comparative negligence.

The laws of France, Switzerland, and Russia are in practical accord with the provisions of section 3 of this bill.

The rule provided for in this section is recognized to some extent in this country. Maryland and some of the other States have passed statutes seeking to divide the responsibility where both parties are guilty of negligence.

The provisions of this section are certainly just. What can be more fair than that each party shall suffer the consequences of his own carelessness? It certainly appeals more strongly to the fair mind than the proposition that the employe shall have no redress whatever, even though his injury is due mainly to the negligence of another. As a consequence of this legislation, we believe there will be fewer accidents. By the responsibility imposed, both parties will be induced to the exercise of greater diligence, and as a result the public will travel and property will be transported in greater safety.

The proviso in section 3 is to the effect that contributory negligence shall not be charged to the employe if he is injured or killed by reason of the violation, by the employer, of any statute enacted for the safety of employes. The effect of the provision is to make a violation of such a statute negligence *per se* on the part of the employer. The courts of some States have held this as a principle of the common-law. Other States have enacted it into statute.

Section 4 provides, in effect, that the employe shall not be charged with the assumption of risk in case he is injured by reason of the violation of the employer of a statute enacted for the safety of his employes. This section likewise makes the violation of such a statute negligence *per se* on the part of the employer, and is already the law in many of the States of the Union.

Section 5 renders void any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act. Many of the States have enacted laws



making void such contracts and regulations, and, so far as we are informed, these statutes have been sustained by the courts. The following States have incorporated into their statutes language similar to the language contained in this bill on this question: Arkansas, California, Colorado, Florida, Georgia, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming. The Supreme Court of Ohio held that a contract exempting a railroad company from liability for injuries was void under the common law as against public safety. Likewise the Supreme Court of Arkansas and the Court of Appeals of Virginia have held the same doctrine. The courts of New York have held that such contracts, though based on a consideration, are void as against public policy. The statutes of Ohio and Iowa fixing the liability of employer to employes, containing provisions similar to this section, have been held constitutional by the Federal Courts, although the cases in which these decisions were rendered did not expressly turn on that question. The courts of Alabama have held such contracts void, regardless of statute. In Georgia and Pennsylvania such contracts have been held valid, but since the decision in Georgia that State has adopted a statute making them void.

This provision is necessary in order to make effective sections 1 and 2 of the bill. Some of the railroads of the country insist on a contract with their employes discharging the company from liability for personal injuries.

In any event, the employes of many of the common carriers of the country are to-day working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employes. As an illustration we quote one paragraph from a blank form of application for a situation with the American Express Company, and entitled "Rules governing employment by this company:"

"I do further agree, in consideration of my employment

by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents, or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury or connected therewith or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators, with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith."

While many of the States have enacted statutes making such contracts void, yet the United States Supreme Court, there being no Federal statute on the subject, have held a similar contract valid in the case of *Voigt v. Baltimore and Ohio Southwestern Railroad* (176 U. S., p. 498). In this case the railroad company entered into a contract with an express company whereby it agreed to carry the business of the express company, to furnish it with cars and certain facilities over its road, and to carry its messengers, in consideration of which the express company agreed to save harmless the railroad company for all claims for damages for personal injury received by its employes, whether the injuries were caused by the negligence of the railroad company or otherwise.

Voigt entered the service of the express company as messenger, and by the contract of his employment he agreed to assume all the risk of accident and injury and to indemnify and save harmless the express company from all claims that might be made against it for injury he might suffer, whether resulting from negligence or otherwise, and to execute a release for the same.

Voigt was injured and sued. The court said:

"He was not constrained to enter into the contract

whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy.”

In the case of *O'Brien v. C. and N. W. Ry. Co.* (Fed. Rep., vol. 116, p. 502), which involved the statute of Iowa making such contracts invalid, the court said:

“That while such contracts would be effective to protect the railroad company from liability at common-law, under such statutory provisions declaratory of the public policy of the State they were invalid and constituted no defense to an action against it for the death of the messenger occurring in the State of Iowa by reason of the wrecking of the express car in which he was employed, through the negligence and want of ordinary care of defendant or its servants, whether the messenger be regarded as an employe of the defendant or not.”

This section of the bill, however, provides that the common carrier may set off against any claim for damages whatever it has contributed toward such insurance, relief benefit, or indemnity that may have been paid to the injured employe, which would seem to be entirely fair and all that ought to be required of the employe.

Some of the roads of the country have established what are called “relief departments,” which seek to operate a species of insurances for the employe against the hazards of the employment, but, so far as we know, all their forms of contracts, used by these relief departments to insure the employe, discharge the company from every possible liability for personal injuries to the employe. This release is made by its terms of agreement in consideration of the contributions of the company to the relief fund.

The following is one of the paragraphs from the form of application for membership in the relief department used by the Baltimore and Ohio Railroad Company:

“I further agree that, in consideration of the contributions of said company to the relief department and of the

guaranty by it of the payment of the benefits aforesaid, the acceptance of benefits from such relief feature for the injury or death shall operate as a release of all claims against said company, or any company owning or operating its branches or divisions, or any company over whose railroad, right of way, or property the said Baltimore and Ohio Railroad Company or any company owning or operating its branches or divisions shall have the right to run or operate its engines or cars or send its employes in the performance of their duty, for damages by reason of such injury or death which could be made by or through me; and that the superintendent may require, as a condition precedent to the payment of such benefits, that all acts by him deemed appropriate or necessary to effect the full release and discharge of the said companies from all such claims be done by those who might bring suit for damages by reason of such injury or death; and also that the bringing of such a suit by me, my beneficiary or legal representative, or for the use of my beneficiary alone, or with others, or the payment by any of the companies aforesaid of damages for such injury or death recovered in any suit or determined by a compromise or any costs incurred therein, shall operate as a release in full to the relief department of all claims by reason of membership therein."

The form of other application used by other companies are similar in terms to the cited, and make acceptance of benefits from said fund a release of all claims for damages for injury or death.

By an act concerning common carriers engaged in interstate commerce and their employes, approved June 1, 1898, known as the "arbitration law," it is made a misdemeanor on the part of any employer subject to the provisions of that act:

"To require any employe or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employe or applicant for employment shall agree to contribute to any fund for charitable, sociable, or beneficial purposes; to release such employer

from legal liability for any personal injury by reason of any benefit arising from the employer's contribution to such fund."

We believe this bill meets the objections of the Supreme Court to the act of June 11, 1906, known as the "employers' liability act," in the case of Howard, administratrix, etc., v. Illinois Central Railroad Company, et al., 6 Cong. Record, 1st Sess. pp. 4434-4436.



## APPENDIX E

### REPORT OF JUDICIARY COMMITTEE OF HOUSE ON AMENDMENTS OF 1910 TO FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

The Committee on the Judiciary, to whom was referred the bill (H. R. 17263) to amend an act entitled, "An act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, having had the same under consideration, beg leave to report it to the House with a recommendation that the bill do pass.

In considering the advisability of amending the act entitled "An act relating to the liability of common carriers by railroads to their employes in certain cases," approved April 22, 1908, it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employes. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by law to employes engaged in interstate commerce in cases of death or injury to such employes while engaged in such service. No purpose or intent on the part of Congress can be found to limit or to take away from such an employe any right theretofore existing by which such employes were entitled to a more extended remedy than that conferred upon them by the act.

The effect of decisions of cases so far adjudicated under

the act has been in general to recognize the true intent of Congress and to extend and make more ample the right to recover damages for death or injury to interstate servants, yet in some particulars its operation has been to limit a recovery which otherwise would have been open to the employe or his representative.

One result of the passage of the law may be to nullify State laws affording a remedy in certain cases for death or injury in railroad service. The State laws which had been operative and which were valid even in their application to those engaged in service in interstate commerce appear to have been rendered, as to interstate servants, ineffective when Congress acted upon this subject. That this seems to have been the effect of the passage of this law was expressly decided in a well-considered opinion by Judge Rogers in the case of *Fulgam v. Midland Valley R. Co.* (167 Fed. 660, p. 662) :

It is clear that the act of April 22, 1908, *supra*, superseded and took the place of all state statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covered not only injuries sustained by employees engaged in that commerce resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making, in certain cases at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive.

All state legislation on that subject must give way before that act (*Miss. Railroad Commission v. Ill. Cent. R. R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; *Sherlock et al. v. Alling, administrator*, 93 U. S. 104, 23 L. Ed. 819). These last cases serve to show that, until Congress has acted with reference to the regulation of interstate commerce, state statutes regulating the relations of master and servant and incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject state legislation must yield.

In *Gulf, Colorado, etc., Railroad Co. v. Hefley* (158 U. S. 99, 19 Sup. Ct. 804, 39 L. Ed. 910), the court said :



“When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the state statute must give way.”

When Congress acted upon the subject of the regulation of the liability of interstate carriers for injuries to their servants engaged in interstate commerce, “the State was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from State competency.” (*Wisconsin v. C., M. & St. P. Ry. Co.*, 117 N. W. 686.)

In the course of his opinion in the case above cited, Justice Dodge, delivering the unanimous opinion of the Supreme Court of Wisconsin, very clearly stated this doctrine and the authority upon which it was based, as follows:

Within the field of authorized congressional action the federal power must, in the nature of things, be supreme in all parts of the United States. “This Constitution, and the laws of the United States which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” (Art. VI, par. 2, Const. U. S.). In *Cooley v. Board of Wardens* (12 How. 299, 318), it was said of this class of legislation: “It is not the mere existence of such power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional legislation.” In *Pennsylvania v. Wheeling, etc., Co.* (18 How. 431), where a state law authorized the building of a bridge over a navigable water, it was declared that even in the matter of a bridge, “if Congress chooses to act, its action necessarily precludes the action of the State.”

In *United States v. Colorado & N. W. R. Co.* (157 Fed. Rep. 321, 330), Sanborn, J., remarks:

“The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power can not be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce

so far as necessary in order to regulate interstate commerce fully and effectually. \* \* \* That power is not subordinate, but is paramount to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by a State of any of its powers impinge or conflict, the former must prevail and the latter must give way.' (See also *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210).

It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a State will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the subject, the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the States of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power, a declaration of the policy that the subject shall be under federal and not state regulation, and that, therefore, the power shall no longer rest in the State to exercise that authority which by the Constitution of the United States was surrendered to the Federal Government when and if Congress deemed its exercise advisable.

In a recent decision of the Court of Civil Appeals, State of Texas, the court unanimously stated this doctrine as follows:

It is well settled that the power of Congress to regulate interstate commerce under the provisions of the Constitution before mentioned is plenary and includes the power to prescribe the qualifications, duties, and liabilities of employees of railway companies engaged in interstate commerce, and any legislation by Congress on such subject supersedes any state law upon the same subject. (*Railway Co. v. Alabama*, 128 U. S. 99; *Howard v. Railway Co.*, 207 U. S. 463.)

The constitutional right of Congress to legislate upon this subject having been exercised by that body, the right of the State to invade this field of legislation ceased, or, at all events, no act of a state legislature in conflict with the act of Congress upon the same subject can be held valid. The supreme courts of Missouri and Wisconsin in passing upon the validity of statutes of said States similar to the act we are considering, hold such statutes void upon the ground of conflict with the act of Congress before mentioned. (*State v. Mo. Pac. Ry. Co.*, 111 S. W. 500; *State v. C. M. & St. P. Ry. Co.*, 117 N. W. 686.)

Judge Cooley, in his work on *Constitutional Limitations*, seventh edition, 856, said:

It is not doubted that Congress has the power to go beyond the general regulation of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by these directions, the exercise of state power is excluded.

It is therefore undoubtedly the law that congressional action upon the liability of carriers engaged in interstate commerce, for injuries to their employes, supersedes all State legislation upon the same subject, and renders them, as long as the Federal law remains in operation, of no avail as providing a legal remedy.

Many of the States provide by statute for the survival of any action which the deceased may have had for the injury to his estate, and for any expenditures during his lifetime resulting from the injury.

In the phraseology of the existing Employers' Liability Act—that is, the Act of April 22, 1908—the expression used is, as to the question now under consideration:

Shall be liable in damages \* \* \* in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of its officers, agents, employees, \* \* \*."

In the case of *Fulgam v. Midland Valley R. R. Company*, hereinbefore cited, the court said:

In the opinion of the court, right of action given to the injured employee by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, at common law, perishes with the injured person.

In the case of *Walsh, admx., v. New York, New Haven & Hartford Railroad Company*, Circuit Judge Lowell, who delivered the opinion of the court, said in a case arising under the Employers' Liability Act of April 22, 1908, after quoting the case of *Fulgam v. Midland Valley R. R. Co.* (167 Fed. 660):

The defendant has further demurred to counts one and four, con-

tending that the employee's cause of action to recover for his conscious suffering did not survive to his administratrix, although the existence of some of the statutory relatives was alleged. As the cause of action is given by a federal statute, this court can not have recourse to a state statute in order to determine whether the cause of action survives or not. (*Schreiber v. Sharpless*, 110 U. S. 76, 80; *B. & O. R. R. v. Joy*, 173 U. S. 226, 230; *U. S. v. DeGoer*, 38 Fed. 80; *U. S. v. Riley*, 104 Fed. 275.) Revised Statutes, section 955, provides that "When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." This section does not itself provide what causes of action shall survive, but in the absence of other controlling statute leaves the matter to the common law. In the case at bar, therefore, the state statutes are inapplicable. There is no general federal statute, and the particular statute in question, the act of 1908, says nothing about survival.

Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive and so that counts one and four are demurrable. (*Fulgam v. Midland Valley Co.*, 167 Fed. 660.) The court is justified in saying that this result has been reached with reluctance. The maxim "*Actio personalis moritur cum persona*" has not always commended itself. (*Pollock on Torts*, Webb's ed., p. 71.) The survival of the cause of action in this case is allowed by the statutes of many States. That one who has suffered in body and in purse by the fault of another, and so has a cause of action against the wrongdoer, should, as to his own estate, be deprived of this remedy by the delays of the law, or without such delay, by his death, before or after action brought, whether connected or unconnected with his first injury, seems to me, as to Sir Frederick Pollock, a barbarous rule. The intent or the oversight of the legislature has established the rule in this case.

The language of the statute should be made clear so that the uncertainty and obscurity suggested by Judge Lowell would be removed. So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear.

It certainly should be as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States, which are suspended in their operation by force of the Federal legislation upon the subject.



## APPENDIX F

### REPORT OF JUDICIARY COMMITTEE OF SENATE ON AMENDMENTS OF 1910 TO FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

The Committee on the Judiciary, having under consideration House bill 17263, reports as follows:

It is of importance at the outset that Congress give careful and serious consideration to remedying any defects in the practical operation of the Employers' Liability Law from time to time as such defects are developed by proceedings in court. This serious attention seems demanded because the good faith of Congress in passing the original act has been made the subject of attack in a publication which has been given wide circulation among railroad counsel of the country. At page 83 of this publication entitled, "Unconstitutionality of the Federal Employers' Liability Act," published by the Price, Lee & Adkins Company, in the course of an argument of Mr. Edward D. Robbins, general counsel of the New York, New Haven & Hartford Railroad Company, in two cases, *Mondou v. New York, New Haven & Hartford Railroad Company*, and *Hoxie v. New York, New Haven & Hartford Railroad Company* (73 Atl. Rep. 754), appears the following:

Does any member of this court believe that this statute would ever have been passed except on the eve of a presidential election under the influence of the great railway unions of this country? If this act did not have so many votes behind it, would the executive department of the United States be here, participating in private litigation, for the purpose of defending its constitutionality?

If there ever was a case in which the courts might properly be appealed to, to set up the fundamental "law of the land" as a bulwark against the arbitrary exercise of power by a Democratic major-

ity and by elected Representatives who fear that majority, I think this is that case.

We may remark in passing that this gratuitous statement could have no proper place in a legal discussion, for the Supreme Court of the United States said in the McCray case (196 U. S. 27)—

the decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.

As such an argument could receive no recognition from any court as a basis of judicial action, as has been pointed out by the Supreme Court in the McCray case, it is strange that it should find its place in the presentation of a serious matter to a court. This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the Employers' Liability Law, which places such stringent liability upon the railroads for injuries to their employes as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to train men of the interstate railroads of the United States for the year 1908 was 281,645.

It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress to shift the burden of the loss resulting from these casualties from "those least able to bear it," and place it upon those who can, as the Supreme Court said in the Taylor case (211 U. S. 281), "measurably control their causes."

The passage of the original act and the perfection thereof by the amendments herein proposed, stand forth as a declaration of public policy to radically change as far as congressional power can extend, those rules of the common law which the President in a recent speech at Chicago charac-

terized as "unjust." President Taft, in his address at Chicago, September 16, 1909, referred "to the continuance of unjust rules of law exempting employers from liability for accidents to laborers."

This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident to meet the modern industrial conditions, and is based not alone upon the failure of these rules in the United States, but their failure in other countries as well. Mr. Asquith, present prime minister of England, said:

It was revolting to sentiment and judgment that men who met with accidents through the necessary exigencies of daily occupation, should be a charge upon their own families.

The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject. In the message President Roosevelt said:

The practice of putting the entire burden of loss to life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in unenviable prominence. In both our federal and our state legislation we have, with few exceptions, scarcely gone farther than the repeal of the fellow-servant principle of the old law of liability, and in some of our States even this slight modification of a completely outgrown principle has not yet been secured. The legislation of the rest of the industrial world stands out in striking contrast to our backwardness in this respect. Since 1895 practically every country in Europe, together with Great Britain, New Zealand, Austria, British Columbia, and the Cape of Good Hope, has enacted legislation embodying in one form or another the complete recognition of the principle which places upon the employer the entire trade risk in the various lines of industry.

In the second volume of Labatt on "Master and Servant," at page 1325, the learned author, after an able discus-



sion of the reasons given by the courts of the doctrine denying a remedy to servants injured by the negligence of fellow-servants, says:

It would appear, therefore, that the doctrine of common employment stands in the singular predicament that it rests very largely, if not entirely, upon a basis of suggested facts which we are asked to accept upon the mere ipse dixit of a certain number of gentlemen who have attained greater or less distinction in a profession which, to say the very least, does not specially qualify them to form a reliable opinion in respect to the subject-matter.

This situation, which would, in any event, be extremely unsatisfactory, is reduced to something like an absurdity by the fact that the judicial theory as to the supposed inevitable consequences of allowing servants to recover for the negligence of their coemployes has long since been exploded by the logic of actual occurrences, the significance of which is unmistakable. In England and her colonies, as well as in America, statutes have been passed which have greatly restricted the operation of the doctrine of common employment. (See Chapters XXXVII-XL, post.) No one would have the hardihood to maintain, in the absence of any specific evidence pointing to that conclusion, that, as a result of the legislation, servants have become to a marked degree less careful and efficient, or that industrial development has been crippled and retarded to an appreciable extent. The practical inference is manifest. If, in countries where the doctrine of common employment has been more or less circumscribed, none of the evil results which it is declared to have obviated can be detected, it may be safely concluded that no harm would have been produced if the doctrine had never been applied, and that no harm will result if it should be entirely abrogated by the legislatures, the only authority by which such a change in the law can now be effected.

This general consideration of the importance of the subject involved in the legislation and the justice of the rule which Congress has established upon this subject is introductory to the specific questions involved in the pending measure. These questions have been so thoroughly covered and fully treated by the report of the House committee that we quote and adopt quite fully the discussion on that subject in the House committee report.

The proposed amendments to the employers' liability bill may be considered under three heads: First, as to the venue of such an action; second, as to the concurrent juris-

diction of the courts of the several States; and, third, as to the survival of the right of action.

(1) As to venue. The amendment proposed as to inserting in section 6 after the words therein, "that no such action shall be maintained under this act unless commenced within two years from the day cause of action accrued," the following:

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of either plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of the commencement of such action.

In his special message of January 7, 1910, President Taft, after referring to a proposed amendment to give the Interstate Commerce Commission power to determine the uniform construction of all steps, ladders, hand brakes, etc., said:

The question has arisen in the operation of the interstate commerce employers' liability act as to whether suit can be brought against the employer company in any place other than of its home office. The right to bring the suit under this act should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws. Bills for both the foregoing purposes have been considered by the House of Representatives, and have been passed, and are now before the Interstate Commerce Committee of the Senate. I earnestly urge that they be enacted into law.

#### AMENDMENT AS TO JURISDICTION—PLACE WHERE SUIT MAY BE BROUGHT

This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an "inhabitant."

This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was issued. This

may be at a place in a distant State from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned.

The extreme difficulty, if not impossibility, of a poor man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances.

That such is the state of law is established by reference to the case of *Cound v. Atchison, Topeka & Santa Fe Railway Company*, decided November 6, 1909, in the United States Circuit Court for the El Paso division of the western district of Texas by Judge Maxey. Judge Maxey in the case before him sustained the railroad's plea to the jurisdiction and dismissed a suit brought in Texas under the Employers' Liability Act on the ground that there was diversity of citizenship in a suit based on a law of the United States.

In his opinion Judge Maxey says:

Referring to the statute and eliminating the federal feature of the present case, the jurisdiction of the court would be clear beyond controversy, since in that case the jurisdiction would be founded only on the fact of diverse citizenship. But here there appear two sources of jurisdiction, the one founded on diverse citizenship and the other upon the fact that the suit arises under a law of the United States. In the former case the statute authorizes suit to be brought in the district of the residence of either the plaintiff or the defendant, where the jurisdiction is founded only on the fact that the action is between citizens of different States; while in the latter suit must be brought in the district of which the defendant is an inhabitant.

The position taken by Judge Maxey in the case just cited is fortified by the opinion of the Supreme Court of the United States in the case of *Macon Grocery Co. v. Atlantic Coast Line Railroad et al.*, decided within a few weeks.

It seems clear from these decisions that a suit in a Federal court under this law, where jurisdiction is founded on the fact that the case involves a Federal statute, must be

brought in the district of which the defendant is an inhabitant.

No argument is necessary to convince that this is a grave injustice to the plaintiff.

Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a Federal court on a right based on the law of the United States.

But to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employes who may be presumed to be unable to meet the expense of presenting their case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist.

#### CONCURRENT JURISDICTION OF STATE COURTS

It is proposed to further amend the act by making the jurisdiction of the courts of the United States "concurrent with the courts of the several States."

This is proposed in order that there shall be no excuse for courts of the States to follow in the error of the Supreme Court of Errors of Connecticut in the case of *Hoxie v. N. Y., N. H. & H. R. R. Co.* (73 Atlantic Rep. 754), in which case the court declined jurisdiction upon the ground, *inter alia*, that Congress did not intend that jurisdiction of cases arising under the act should be assumed by state courts.

It is clear under the decisions of the Supreme Court of the United States that this conclusion of the Connecticut court is erroneous. And the reasons recited by the Connecticut court lead to an opposite conclusion from that which the opinion declares upon the subject. But no harm can come, and much injustice and wrong to suitors may be prevented by an express declaration that there is no intent on the part of Congress to confine remedial actions brought under the Employers' Liability Act to the courts of the United States.

In declaring that the jurisdiction of the United States

courts shall be "concurrent with the courts of the several States," Congress is clearly within its rights and powers.

The first precedent for such declaration is found in the action of the First Congress. In the act of September 24, 1789, it was enacted that the district courts of the United States—

shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. (*c*) And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars (U. S. Stat. L., Vol. I, p. 77).

This precedent has repeatedly been followed in Federal legislation. Thus early was it established by those who understood the full scope and operation of the Constitution of the United States, that the "supreme law of the land" did not lose any of its imperative obligation at the door of a state court.

The express declaration of the United States Constitution says of laws enacted by Congress in pursuance of its delegated powers, "and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

This declaration of the Constitution is not meaningless. That the "judges in every State shall be bound" by a Federal law imposes a binding duty to enforce it.

This provision leaves no discretion to a judge of a state court to refuse justice to a suitor because his right is based on a Federal law.

The Connecticut court says that this Federal statute known as the Employers' Liability Act, "would also compel courts established by a sovereign power, and maintained at its expense for the enforcement of what is deemed justice, to enforce what it deemed injustice." We may disregard for the moment the suggestion of the injustice of a particular statute. The local opinion of the justice of a particular law is no obstacle to its enforcement if it be a binding law.



We will therefore consider the proposition solely as if the factor of local opinion as to its justice was eliminated from controversy. A court may err in its estimate of what its State really did "consider injustice."

Does the fact that state courts are "established by a sovereign power and maintained at its expense" permit denial of enforcement in such courts of a right founded on a Federal statute?

This question is squarely answered in a case which, strangely enough, is cited by the court in the Hoxie case. (*Claffin v. Houseman*, 93 U. S. 130.) In this case Mr. Justice Bradley says:

The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws.

Chancellor Kent, in his *Commentaries* (1 Com. 400), says:

In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter.

To quote from Cooley's *Principles of Constitutional Law*, pages 32-33:

A state law must yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the "supreme law" was adopted or enacted afterwards. The same is true of any provision in the constitution of any State which is found to be repugnant to the Constitution of the Union. And not only must "the judges in every State" be bound by such supreme law, but so must the State itself, and every official in all its departments, and every citizen.

And in the notes, pages 33-35, we read:

The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it. (*Tennessee v. Davis*, 100 U. S. 257, per Strong, J.; see also *In re Debs*, petitioner, 158 U. S. 564; *Logan v. United States*, 144 U. S. 263; \* \* \* *Dodge v. Wolsey*, 18 How. 331; *Jefferson Branch Bank v. Skelly*, 1 Black. 436; *Cummings v. Missouri*, 4 Wall. 277; *Railroad Co. v. McClure*, 10 Wall. 511; *White v. Hart*, 13 Wall. 646; *Gunn v. Barry*, 15 Wall. 610; *Pacific Railroad Co. v. Maguire*, 20 Wall. 36; *St. Louis, &c., Ry. Co. v. Vickers*, 122 U. S. 360.) A state can not control the conduct of an agency of the Federal Government within its limits, if the result would be a conflict with national law or an impairment of the efficiency of the agency. (*Davis v. Elmira Savings Bank*, 161 U. S. 275; *McClellan v. Chipman*, 164 U. S. 347. Compare *Reagan v. Mercantile Trust Co.*, 154 U. S. 413.)

Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act. (*Marshall, C. J.*, in *Sturges v. Crowninshield*, 4 Wheat. 122.)

In *Robb v. Connolly* (111 U. S. 637), Mr. Justice Harlan said:

Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof. Wherever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding." If they fail therein, and withhold or deny rights or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.



In re Matthews (122 Fed. Rep. 248, p. 251) :

The second clause of article 6 of the Federal Constitution is in these words:

“This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”

A recent writer in the American Law Review has had this to say concerning this clause, to-wit:

“This provision presupposes that the judges in every State will have some knowledge of the Constitution, the laws, and the treaties of the Federal Government by which they are thus to be bound; and this community of interest and obligation obviously makes the judicial officers of the several States, in a certain high sense, members of the federal judiciary.”

In the case of *Robb v. Connolly* (111 U. S. 637, 4 Sup. Ct. 551, 28 L. Ed. 542), Mr. Justice Harlan said:

“A state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution or laws.”

And again:

“Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever these rights are involved in any suit or proceeding before them.”

In the case of *Ex parte Royall*, *supra*, Mr. Justice Harlan said:

In *Taylor v. Carryl* (20 How. 595, 15 L. Ed. 1028) it was said to be a recognized portion of the duty of this court (and, we will add, of all other courts, national and state) “to give preference to such principles and methods or procedure as shall seem to conciliate the

distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system, coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and federal obligations." And in *Covell v. Heyman* (111 U. S. 182, 4 Sup. Ct. 358, 28 L. Ed. 390) it was declared "that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided by avoiding interference with the process of the other, is a principle of comity, with perhaps no higher sanction than the ability of which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity."

Pomeroy, "Introduction to the Constitutional Law of the United States," third edition, 503, Section 743:

Strip the National Government of an authority to apply a sanction commensurate with its power to legislate, and just so far we subtract from that legislation the necessary element of a command. Strip the Government of the ability to make that sanction supreme, and we equally invalidate the authority of the legislative utterance. This attribute of supremacy would be destroyed by permitting the state courts, for example, to decide upon the effect of national laws, and by making their decisions in the particular State where made of an equal authority with those pronounced upon the same subject by the national judges. This difficulty thus to be apprehended from the action of state tribunals could only be prevented in one of two ways—either by removing from them the power to decide at all upon rights and duties which spring from the national legislation and conferring the function exclusively upon the United States courts, or by permitting the state judiciary to exercise a jurisdiction in such cases, but making that jurisdiction subordinate to the authority of the national courts and rendering the local decisions reviewable by the United States judges, who could in this manner enforce their attribute of supremacy in relation to the matters under consideration.

In theory the former of these plans would have been the more simple and perfect. But it was perhaps best, from some motives of expediency, that the Constitution should not expressly determine between these two methods, but should clothe Congress with the power of making such a choice of the alternatives as should be found to promote the convenience of the people. Congress possesses such an authority; it might make all this jurisdiction exclusive in the national courts, but has done so only in particular cases; it might suffer the state tribunals to exercise a complete concurrent power, subject to

an equally complete liability to review, but has done so only to a limited extent. Whether Congress shall adopt one or the other alternative is a mere question of policy; it may do either. \* \* \*

The Supreme Court of the United States, in *Teal v. Fulton* (53 U. S. 292), referring to this subject, said:

We will add that the legislation of Congress immediately after the Constitution was carried into operation confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and the United States was contemplated, for its first provision is for a review of cases adjudicated in the forum, "where is drawn in question the validity of a treaty or a statute of, or an authority exercised by, the United States, and the decision is against their validity."

The Supreme Court of the United States decided in this case of *Teal v. Fulton*, that a state court had jurisdiction to try an action brought against a postmaster who refused to deliver a newspaper on which there was "an initial" unless the addressee would pay letter postage, the action being founded on the thirteenth and thirtieth sections of the act of Congress passed in 1825 forbidding a writing or memorandum on a newspaper or other printed matter, pamphlet, or magazine transmitted by mail. The court said, Mr. Justice Wayne delivering the opinion:

But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States in respect to the services to be rendered in the transmission of letters and newspapers by mail and by the Constitution of the United States than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States and the courts of the States, or concerning the exclusive jurisdiction given by the Constitution to the former.

The United States undertakes at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender or be paid when either reach their destination by the person to whom they are addressed. When tendered by the latter or by his agent he has the right to the immediate possession of them, though he has not had before the actual possession. If they be wrongfully withheld for the charge of unlawful

postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court.

Now, the courts of New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States by the Constitution of the United States. That such is not the case, we can not express our view better than Mr. Justice Wright has done in his opinion in this case in the court of appeals. After citing the second section of the third article of the Constitution, he adds, "This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary."

We will add that the legisltion of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former, "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity." We are satisfied that there was no error in the decision of the court of appeals in this case, and the same is affirmed by this court.

In the case of *The Moses Taylor* (1866, 4 Wall., U. S., 428) the court said:

\* \* \* The judiciary act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends Congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are



placed, from their commencement, exclusively under the cognizance of the federal courts.

On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a federal or a state court, at the option of the plaintiff; and if brought in the state court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the federal courts. Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the judiciary act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions can not be seriously questioned, and is of frequent recognition by both state and federal courts.

It is difficult to understand why the Connecticut court cites the case of *Claffin v. Houseman* (93 U. S. 130) as authority for the remarkable position taken, for a careful consideration of the opinion of Mr. Justice Bradley in that case shows conclusively that the opinion affords no basis for the contention made by the court that the state court is not authorized and required to enforce Federal statutes. In his opinion, Mr. Justice Bradley said:

The general question, whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States has been elaborately discussed, both on the bench and in published treatises; sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction.

The laws of the United States are laws of the several States, and

just as much binding on the citizens and courts thereof as state laws are.

The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State: concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws may be prosecuted in the state courts and also, if the parties reside in different States, in the federal courts.

So rights, whether legal or equitable, acquired under the laws of the United States may be prosecuted in the United States courts or in the state courts competent to decide rights of the like character and class, subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction.

See remarks of Mr. Justice Field in *The Moses Taylor* (4 Wall. 429, 71 U. S., XVIII, 401), and Story, J., in *Martin v. Hunter* (1 Wheat. 334), and Mr. Justice Swayne in *Ex parte McNeil* (13 Wall. 236, 80 U. S., XX, 624).

This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.

If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court.

The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments.

It is often the cause or the consequence of an unjustifiable jealousy of the United States Government which has been the occasion of disastrous evils to the country.

It is true the sovereignties are distinct, and neither can interfere

with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman v. Booth* (21 How. 506, 62 U. S., XVI, 169), and hence state courts have no power to revise the action of the federal courts, nor the federal the state, except where the Federal Constitution or laws are involved. But this is no reason why state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied. \* \* \*

In *Ex parte Siebold* (100 U. S.) the court said :

The power of Congress, as we have seen, is paramount, and may be exercised at any time and to any extent which it deems expedient; and so far as it is exercised and no further the regulations affected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the state and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself.

We can not yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.

There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded.

But in this case expressly, and in some others by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedence is eliminated.

The position assumed by the court on this question is without precedent and is entirely untenable in the light of the judicial history of the United States. If a Federal right can not be the basis of a plaintiff's claim in a state court; if those courts derive their power and authority and compensation from the States for the purpose of deciding only



controversies arising under the law of the State, written and unwritten, then a defense based upon a Federal right would be equally unenforceable in said courts. If they refuse to try Federal questions for a plaintiff, because they are without jurisdiction, how can they consent to try a Federal question when asserted as a ground of defense by the party proceeded against?

In a comparatively recent case the Supreme Court of the United States, in the case of the Defiance Water Co. v. Defiance (191 U. S. 194), Chief Justice Fuller, in delivering the opinion of the court, used the following language:

Moreover, the state courts are perfectly competent to decide federal questions arising before them and it is their duty to do so. (Robb v. Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 Sup. Ct. Rep. 544; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 583, 40 L. Ed. 336, 543, 16 Sup. Ct. Rep. 389.)

And we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. (Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 27 L. Ed. 636, 1 Sup. Ct. Rep. 614, 617; Shreveport v. Cole, 129 U. S. 36, 32 L. Ed. 589, 9 Sup. Ct. Rep. 210; Neal v. Delaware, 103 U. S. 370, 389, 26 L. Ed. 567, 571; New Orleans v. Benjamin, 153 U. S. 411, 424, 38 L. Ed. 764, 769, 14 Sup. Ct. Rep. 905.)

If error supervenes the remedy is found in paragraph 709 of the Revised Statutes. (U. S. Comp. Stat., 1901, p. 575.)

In *Claffin v. Houseman*, *ante*, the court said:

The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. \* \* \*

The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments.

It is often the cause or the consequence of an unjustifiable jealousy of the United States Government, which has been the occasion of disastrous evils to the country.

Mr. Justice Shiras, in commenting upon the concurrent jurisdictional power of the state and federal courts, in the

case of *Murray v. Chicago and N. W. Ry. Co.* (62 Fed. Rep. 24), said:

A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the State can not legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several States do not necessarily apply to the judicial branches of the national and state governments. The legislature of a State can not abrogate or modify any of the provisions of the Federal Constitution nor of the acts of Congress touching matters within congressional control, but the courts of the State, in the absence of a prohibitory provision in the Federal Constitution or acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States.

The courts of the States are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State when the adverse parties are citizens of different States. The duty of the court is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of the State can not abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond legislative control does not, ipso facto, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, the court would have had jurisdiction to hear and determine the issues between the parties, because Congress had not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete.

The discussion by Judge Baldwin of the right of a state court to refuse to enforce such a statute as the one in question and his reference to the "public policy" of a State as a ground for such a refusal to take jurisdiction indicate clearly that he had in mind the decisions as to the exercise of "comity" by the courts of one State in taking jurisdic-

tion of foreign laws; that is, the laws of another State. There are many decisions upon the right of a party to enforce in one State the statutes of another.

If this was such a case, there is authority for the position taken in the Hoxie case. But the decision in these cases is justified on the ground that statutes of other States (foreign laws) have no extraterritorial force. Such decisions have no bearing when the question before a state court is the enforcement of a Federal law. This is not a mere question of comity; it is a question of authority.

The Federal law is imperative, mandatory, and paramount over every foot of the soil of every State. It is in no sense foreign when its application or enforcement is sought in the courts of a State. No policy of a State can impair its imperative obligation. No official of a State, sworn to support the Constitution of the United States can deny the enforcement of a statute of the United States, made in pursuance of the United States Constitution. Such law by the Constitution is made "the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding."

How can a judge of a state court deny the imperative obligation of a Federal statute on any occasion in his court? Before he can lawfully assume the duties as such state judge he is bound by oath in obedience to the express requirements of the Constitution (Art. VI, sec. 3) to support the Constitution of the United States, which in express terms makes Federal statutes "the supreme law of the land," and the judges in every State shall be bound thereby, "anything in the Constitution or laws of any State to the contrary notwithstanding."

Federal laws are not dependent upon the judicial courtesy of state courts, to be enforceable in the courts of some States and to be refused enforcement in others. They are "the supreme law of the land, and the judges in every State shall be bound thereby."

## SURVIVAL OF ACTION

In considering the advisability of amending the act entitled "An act relating to the liability of common carriers by railroads to their employes in certain cases," approved April 22, 1908, it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employes. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by law to employes engaged in interstate commerce in cases of death or injury to such employes while engaged in such service. No purpose or intent on the part of Congress can be found to limit or to take away from such an employe any right theretofore existing by which such employes were entitled to a more extended remedy than that conferred upon them by the act.

The effect of decisions of cases so far adjudicated under the act has been in general to recognize the true intent of Congress and to extend and make more ample the right to recover damages for death or injury to interstate servants, yet in some particulars its operation has been to limit a recovery which otherwise would have been open to the employe or his representative.

One result of the passage of the law may be to nullify state laws affording a remedy in certain cases for death or injury in railroad service. The state laws which had been operative and which were valid even in their application to those engaged in service in interstate commerce appear to have been rendered, as to interstate servants, ineffective when Congress acted upon this subject. That this seems to have been the effect of the passage of this law was expressly decided in a well-considered opinion by Judge



Rogers in the case of *Fulgam v. Midland Valley R. Co.* (167 Fed. 660, p. 662):

It is clear that the act of April 22, 1908, *supra*, superseded and took the place of all state statutes regulating relations of employers and employes engaged in interstate commerce by railroads. It covered not only injuries sustained by employes engaged in that commerce resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making, in certain cases at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive.

All state legislation on that subject must give way before that act. (*Miss. Railroad Commission v. Ill. Cent. R. R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; *Sherlock et al. v. Alling*, administrator, 93 U. S. 104, 23 L. Ed. 819.) These last cases serve to show that, until Congress has acted with reference to the regulation of interstate commerce, state statutes regulating the relations of master and servant and incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject state legislation must yield.

In *Gulf, Colorado, etc., Railroad Co. v. Hefley* (158 U. S. 99, 19 Sup. Ct. 804, 39 L. Ed. 910) the court said: "When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the state statute must give way."

When Congress acted upon the subject of the regulation of the liability of interstate carriers for injuries to their servants engaged in interstate commerce, "the State was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from state competency." (*Wisconsin v. C., M. & St. P. Ry. Co.*, 117 N. W. 686.)

In the course of his opinion in the case above cited, Justice Dodge, delivering the unanimous opinion of the supreme court of Wisconsin, very clearly stated this doctrine and the authority upon which it was based, as follows:

Within the field of authorized congressional action the federal power must, in the nature of things, be supreme in all parts of the

United States. "This Constitution, and the laws of the United States which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." (Art. VI, par. 2, Const. U. S.) In *Cooley v. Board of Wardens* (12 How. 299, 318), it was said of this class of legislation: "It is not the mere existence of such power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the State, and that the States may legislate in the absence of congressional legislation." In *Pennsylvania v. Wheeling, etc., Co.* (18 How. 431), where a state law authorized the building of a bridge over a navigable water, it was declared that even in the matter of a bridge "if Congress chooses to act, its action necessarily precludes the action of the State."

In *United States v. Colorado & N. W. R.* (157 Fed. Rep. 321, 330), Sanborn, J., remarks:

"The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power can not be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce, so far as necessary, in order to regulate interstate commerce fully and effectually. \* \* \* That power is not subordinate but is paramount to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by a State of any of its powers impinge or conflict, the former must prevail and the latter must give way." (See also *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210.)

It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a State will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the subject, the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the States of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power, a declaration of the policy that the subject shall be under federal and not state regulation, and that, therefore, the power shall no longer rest in the State to exercise that authority which by the Constitution of the United States was surrendered to the Federal Government when and if Congress deemed its exercise advisable.

In a recent decision of the court of civil appeals, State of Texas, the court unanimously stated this doctrine as follows:

It is well settled that the power of Congress to regulate interstate commerce under the provisions of the Constitution before mentioned is plenary and includes the power to prescribe the qualifications, duties, and liabilities of employes of railway companies engaged in interstate commerce, and any legislation by Congress on such subject supersedes any state law upon the same subject. (*Railway Co. v. Alabama*, 128 U. S. 99; *Howard v. Railway Co.*, 207 U. S. 463.)

The constitutional right of Congress to legislate upon this subject having been exercised by that body, the right of the State to invade this field of legislation ceased, or, at all events, no act of a state legislature in conflict with the act of Congress upon the same subject can be held valid. The supreme courts of Missouri and Wisconsin, in passing upon the validity of statutes of said States similar to the act we are considering, hold such statutes void upon the ground of conflict with the act of Congress before mentioned. (*State v. Mo. Pac. Ry. Co.*, 111 S. W. 500; *State v. C. M. & St. P. Ry. Co.*, 117 N. W. 686.)

Judge Cooley, in his work on *Constitutional Limitations*, seventh edition, 856, said:

It is not doubted that Congress has the power to go beyond the general regulation of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by these directions, the exercise of state power is excluded.

It is therefore undoubtedly the law that congressional action upon the liability of carriers engaged in interstate commerce, for injuries to their employes, supersedes all state legislation upon the same subject, and renders them, as long as the Federal law remains in operation, of no avail as providing a legal remedy.

Many of the States provide by statute for the survival of any action which the deceased may have had for the injury to his estate, and for any expenditures during his lifetime resulting from the injury.

In the phraseology of the existing *Employers' Liability Act*—that is, the Act of April 22, 1908—the expression used is, as to the question now under consideration:

Shall be liable in damages \* \* \* in case of death of such employe, to his or her personal representative for the benefit of the



surviving widow or husband and children of such employe; and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of its officers, agents, employes, \* \* \*."

In the case of *Fulgam v. Midland Valley R. R. Company*, hereinbefore cited, the court said:

In the opinion of the court, right of action given to the injured employe by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, at common law, perishes with the injured person.

In the case of *Walsh, admx., v. New York, New Haven and Hartford Railroad Company*, Circuit Judge Lowell, who delivered the opinion of the court, said in a case arising under the Employers' Liability Act of April 22, 1908, after quoting the case of *Fulgam v. Midland Valley R. R. Co.* (167 Fed. 660):

The defendant has further demurred to counts one and four, contending that the employe's cause of action to recover for his conscious suffering did not survive to his administratrix, although the existence of some of the statutory relatives was alleged. As the cause of action is given by a federal statute, this court can not have recourse to a state statute in order to determine whether the cause of action survives or not. (*Schreiber v. Sharpless*, 110 U. S. 76, 80; *B. & O. R. R. v. Joy*, 173 U. S. 226, 230; *U. S. v. DeGoer*, 38 Fed. 80; *U. S. v. Riley*, 104 Fed. 275.) Revised Statutes, section 955, provides that "When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." This section does not itself provide what causes of action shall survive, but in the absence of other controlling statute leaves the matter to the common law. In the case at bar, therefore, the state statutes are inapplicable. There is no general federal statute, and the particular statute in question, the act of 1908, says nothing about survival.

Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive and so that counts one and four are demurrable. (*Fulgam v. Midland Valley Co.*, 167 Fed. 660.) The court is justified in saying that

this result has been reached with reluctance. The maxim "*Actio personalis moritur cum persona*" has not always commended itself. (Pollock on Torts, Webb's ed., p. 71.) The survival of the cause of action in this case is allowed by the statutes of many States. That one who has suffered in body and in purse by the fault of another, and so has a cause of action against the wrongdoer, should, as to his own estate, be deprived of this remedy by the delays of the law, or without such delay, by his death, before or after action brought, whether connected or unconnected with his first injury, seems to me, as to Sir Frederick Pollock, a barbarous rule. The intent or the oversight of the legislature has established the rule in this case.

The language of the statute should be made clear so that the uncertainty and obscurity suggested by Judge Lowell would be removed. So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear.

It certainly should be as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States, which are suspended in their operation by force of the Federal legislation upon the subject.

## APPENDIX G

### FEDERAL LOCOMOTIVE ASH PAN ACT

AN ACT to promote the safety of employes on railroads.

SECTION 1. On and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employe going under such locomotive.

SEC. 2. On and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any Territory of the United States or of the District of Columbia to use any locomotive not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employe going under such locomotive.

SEC. 3. Any such common carrier using any locomotive in violation of any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to enforce the provisions of this act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this act.

SEC. 5. The term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 6. Nothing in this act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

## APPENDIX H

### FEDERAL HOURS OF SERVICE ACT

AN ACT to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon.

SECTION 1. The provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned and operated under a contract, agreement, or lease; and the term "employes" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. It shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty

until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty; *Provided*, That no operator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. Any such common carrier, or any officer or agent thereof, requiring or permitting any employe to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the



common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.



## APPENDIX I

### FEDERAL BOILER INSPECTION ACT<sup>1</sup>

AN ACT to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

SECTION 1. The provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employes" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. From and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such

<sup>1</sup> This Act was amended by an Act approved March 4, 1915, see p. 450, *post*.

carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

SEC. 3. There shall be appointed by the President, by and with the advice and consent of the Senate, a chief inspector and two assistant chief inspectors of locomotive boilers, who shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of this act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject thereto. The said chief inspector and his two assistants shall be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions hereof relating to the inspection and maintenance of locomotive boilers. The chief inspector shall receive a salary of four thousand dollars per year and the assistant chief inspectors shall each receive a salary of three thousand dollars per year; and each of the three shall be paid his traveling expenses incurred in the performance of his duties. The office of the chief inspector shall be in Washington, District of Columbia, and the Interstate Commerce Commission shall provide such stenographic and clerical help as the business of the offices of the chief inspector and his said assistants may require.

SEC. 4. Immediately after his appointment and qualification the chief inspector shall divide the territory comprising the several States, the Territories of New Mexico and Arizona, and the District of Columbia into fifty locomotive boiler-inspection districts, so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. Thereupon there shall be appointed by the Interstate Commerce Commission fifty inspectors of locomotive boilers. Said inspectors shall be

in the classified service and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. The chief inspector shall assign one inspector so appointed to each of the districts hereinafter named. Each inspector shall receive a salary of one thousand eight hundred dollars per year and his traveling expenses while engaged in the performance of his duty. He shall receive in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commerce Commission, but not to exceed in the case of any district inspector six hundred dollars per year. In order to obtain the most competent inspectors possible, it shall be the duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to construction, repair, operation, testing, and inspection of locomotive boilers, and their practical experience in such work, which list, being approved by the Interstate Commerce Commission, shall be used by the Civil Service Commission as a part of its examination. No person interested, either directly or indirectly, in any patented article required to be used on any locomotive under supervision or who is intemperate in his habits shall be eligible to hold the office of either chief inspector or assistant or district inspector.

SEC. 5. Each carrier subject to this act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served

upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also*, That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however*, That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

SEC. 6. It shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of this act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this act shall file with the inspector in charge, under the oath of the proper officer or employe, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employe, a report showing the repair of the defects disclosed



by the inspection. The rules and regulations hereinbefore provided for shall perscribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided*, That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may within five days after receiving said notice, appeal to the chief inspector by telegraph or by letter to have said boiler reexamined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors or any district inspector other than the one from whose decision the appeal is taken to reexamine and inspect said boiler within fifteen days from date of notice. If upon such reexamination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the reexamination of said boiler sustains the decision of the district inspector, the chief inspector shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Interstate Commerce Commission, and upon such appeal, and after hearing, said Commission shall have power to revise, modify, or set aside such action of the chief inspector and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further*, That pending either appeal the requirements of the inspector shall be effective.

SEC. 7. The chief inspector shall make an annual report to the Interstate Commerce Commission of the work done

during the year, and shall make such recommendations for the betterment of the service as he may desire.

SEC. 8. In the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it can not be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section, and upon the receipt of said report, if it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the commission deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

SEC. 9. Any common carrier violating this act or any rule or regulation made under its provisions or any lawful order of any inspector shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States

having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys, subject to the direction of the Attorney General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of this act coming to his knowledge.

SEC. 10. The total amounts directly appropriated to carry out the provisions of this act shall not exceed for any one fiscal year the sum of three hundred thousand dollars.



## APPENDIX J

### FEDERAL SAFETY APPLIANCE ACTS

AN ACT to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

SECTION 1. From and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose.

SEC. 2. On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or

shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. From and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. Within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. (As amended by the act of April 1, 1896.) Any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of

one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheeled cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

SEC. 7. The Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. Any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

#### AMENDMENT OF 1903 TO FEDERAL SAFETY APPLIANCE ACT OF 1893

AN ACT to amend an act entitled, "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second,

eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

SECTION 1. The provisions and requirements of the act entitled "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six [see pp. 2401, 2402], shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. Whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes



which must have their brakes used and operated as aforesaid; and failure to comply with any such requirements of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. The provisions of this act shall not take effect until September first, nineteen hundred and three. Nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this act, apply to this act.

Approved March 2nd, 1903. 32 Stat. at L. 943, c. 976.

#### AMENDMENT OF 1910 TO FEDERAL SAFETY APPLIANCE ACT OF 1893

An Act to supplement "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance acts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this act shall apply to every common carrier and every vehicle subject to the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nine-

teen hundred and three, commonly known as the "Safety Appliance Acts."

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission, to be made after full hearing, and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: *Provided*, That the Interstate Commerce Commission may,

upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

SEC. 4. That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this act or section six of the act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this



section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

SEC. 5. That except that, within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this act.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this act, and all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this act.

Approved, April 14, 1910.

## APPENDIX K

### ORDER OF THE INTERSTATE COMMERCE COMMISSION JUNE 6, 1910

#### IN RE MINIMUM PERCENTAGE OF POWER BRAKES

The Commission having under consideration the question of requiring an increase in the minimum percentage of power brakes to be used and operated on trains and railroads engaged in interstate commerce, as provided by section two of the act of March 2, 1903, and it appearing to the Commission, after full hearing had on May 5, 1909, due notice of which was given all common carriers, owners and lessees engaged in interstate commerce by railroad in the United States, and at which time all interested parties were given an opportunity to be heard and submit their views, that to secure more fully the objects of the act to promote the safety of employes and travelers on railroads, the minimum percentage of power-brake cars to be used in trains, as established by its order of November 15, 1905, should be further increased.

*It is ordered,* That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than eighty-five per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the eighty-five per cent shall have their brakes so used and operated.

## APPENDIX L

### ORDER OF THE INTERSTATE COMMERCE COMMISSION, OCTOBER 10, 1910

#### IN RE STANDARD HEIGHT OF DRAWBARS

Whereas, by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and

Whereas, a hearing in the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910,

Now, therefore, in pursuance of and in accordance with the provisions of said section 3 of said act,

*It is ordered*, That (except on cars specified in the proviso in section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896) the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed—to-wit: The maximum height of drawbars for freight cars measured perpendicularly from

the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said act shall be  $34\frac{1}{2}$  inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be  $31\frac{1}{2}$  inches, and on narrow-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be  $17\frac{1}{2}$  inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be  $14\frac{1}{2}$  inches.

*And it is further ordered,* That such modification or change shall become effective and obligatory December 31, 1910.

## APPENDIX M

### ORDER OF THE INTERSTATE COMMERCE COMMISSION, MARCH 13, 1911

IN RE DESIGNATING THE NUMBER, DIMENSIONS, LOCATION, AND MANNER OF APPLICATION OF CERTAIN SAFETY APPLIANCES

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any



requirement of this act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29th and 30th and October 7th, 1910, respectively; and February 27th, 1911;

Now, therefore, in pursuance of and in accordance with the provisions of said section three of said act, and superseding the Commission's order of October 13, 1910, relative thereto

*It is ordered*, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:

## BOX AND OTHER HOUSE CARS

### HAND-BRAKES

**NUMBER:** Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

**DIMENSIONS:** The brake-shaft shall be not less than one and one-fourth ( $1\frac{1}{4}$ ) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16), inches in diameter, of malleable iron, wrought iron or steel.

**LOCATION:** The hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

MANNER OF APPLICATION: There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Top brake-shaft support shall be fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets. (See Plate A.)

A brake-shaft step shall support the lower end of brake-shaft. A brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred. (See Plate A.)

Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths ( $\frac{7}{8}$ ) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-chain shall be of not less than three-eighths ( $\frac{3}{8}$ ), preferably seven-sixteenths ( $\frac{7}{16}$ ), inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenths ( $\frac{7}{16}$ ), preferably one-half ( $\frac{1}{2}$ ), inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half ( $\frac{1}{2}$ ) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.)

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths ( $\frac{3}{4}$ ), preferably one (1), inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring. (See Plate A.)

Brake-shaft drum shall be not less than one and one-half ( $1\frac{1}{2}$ ) inches in diameter. (See Plate A.)

Brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square fit shall be not less than one



and five-sixteenths ( $15\frac{1}{16}$ ) inches square. When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth ( $5\frac{1}{4}$ ), preferably five and one-half ( $5\frac{1}{2}$ ), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth. (See Plate A.)

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five-eighths ( $\frac{5}{8}$ ) of an inch in diameter, or upon a trunnion secured by not less than one-half ( $\frac{1}{2}$ ) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths ( $\frac{3}{4}$ ) of an inch in diameter; said nut shall be secured by riveting over or by the use of lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square-fit for brake-shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches. (See Plate A.)

#### BRAKE-STEP

If brake-step is used, it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

MANNER OF APPLICATION: Brake-step shall be supported by not less than two metal braces having a minimum cross-sectional area three-eighths ( $\frac{3}{8}$ ) by one and one-half ( $1\frac{1}{2}$ )

inches or equivalent, which shall be securely fastened to body of car with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### RUNNING-BOARDS

**NUMBER:** One (1) longitudinal running-board.

On outside-metal-roof cars two (2) latitudinal extensions.

**DIMENSIONS:** Longitudinal running-board shall be not less than eighteen (18), preferably twenty (20), inches in width.

Latitudinal extensions shall be not less than twenty-four (24) inches in width.

**LOCATION:** Full length of car, center of roof.

On outside-metal-roof cars there shall be two (2) latitudinal extensions from longitudinal running-board to ladder locations, except on refrigerator cars where such latitudinal extensions can not be applied on account of ice hatches.

**MANNER OF APPLICATION:** Running-boards shall be continuous from end to end and not cut or hinged at any point: *Provided*, That the length and width of running-boards may be made up of a number of pieces securely fastened to saddle-blocks with screws or bolts.

The ends of longitudinal running-board shall be not less than six (6) nor more than ten (10) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill; and if more than four (4) inches from edge of roof of car, shall be securely supported their full width by substantial metal braces.

Running-boards shall be made of wood and securely fastened to car.

#### SILL-STEPS

**NUMBER:** Four (4).

**DIMENSIONS:** Minimum cross-sectional area one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum clear depth, eight (8) inches.

LOCATION: One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

MANNER OF APPLICATION: Sill-steps exceeding twenty-one (21) inches in depth shall have an additional tread.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### LADDERS

NUMBER: Four (4).

DIMENSIONS: Minimum clear length of tread: Side ladders sixteen (16) inches; end ladders fourteen (14) inches.

Maximum spacing between ladder-treads, nineteen (19) inches.

Top ladder-tread shall be located not less than twelve (12) nor more than eighteen (18) inches from roof at eaves.

Spacing of side ladder treads shall be uniform within a limit of two (2) inches from top ladder tread to bottom tread of ladder.

Maximum distance from bottom tread of side ladder to top tread of sill-step, twenty-one (21) inches.

End ladder treads shall be spaced to coincide with treads of side ladders, a variation of two (2) inches being allowed. Where construction of car will not permit the application of a tread of end ladder to coincide with bottom tread of side ladder, the bottom tread of end ladder must coincide with second tread from bottom of side ladder.

Hard-wood treads, minimum dimensions one and one-half ( $1\frac{1}{2}$ ) by two (2) inches.

Iron or steel treads, minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch.

Minimum clearance of treads, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) on each side, not more than eight (8) inches from right end of car; one (1) on each end, not more than eight (8) inches from left side of car; measured from inside edge of ladder-stile or clearance of ladder treads to corner of car.

MANNER OF APPLICATION: Metal ladders without stiles near corners of cars shall have foot guards or upward projections not less than two (2) inches in height near inside end of bottom treads.

Stiles of ladders, projecting two (2) or more inches from face of car, will serve as foot-guards.

Ladders shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets. Three-eighths ( $\frac{3}{8}$ ) inch bolts may be used for wooden treads which are gained into stiles.

#### END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### ROOF-HANDHOLDS

NUMBER: One (1) over each ladder.

One (1) right-angle handhold may take the place of two

(2) adjacent specified roof-handholds, provided the dimensions and locations coincide, and that an extra leg is securely fastened to car at point of angle.

**DIMENSIONS:** Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

**LOCATION:** On roof of car: One (1) parallel to treads of each ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof, *except* on refrigerator cars where ice hatches prevent, when location may be nearer edge of roof.

**MANNER OF APPLICATION:** Roof-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### SIDE-HANDHOLDS

**NUMBER:** Four (4).

[*Tread of side-ladder is a side-handhold.*]

**DIMENSIONS:** Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

**LOCATION:** Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

**MANNER OF APPLICATION:** Side-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts



with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### HORIZONTAL END-HANDHOLDS

NUMBER: Eight (8) or more. (Four (4) on each end of car.)

[*Tread of end-ladder is an end-handhold.*]

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

A handhold fourteen (14) inches in length may be used where it is impossible to use one sixteen (16) inches in length.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) near each side on each end of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, when tread of end-ladder is an end-handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill or sheathing over end-sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

On each end of cars with platform end-sills six (6) or more inches in width, measured from end-post or siding and extending entirely across end of car, there shall be one additional end-handhold not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

MANNER OF APPLICATION: Horizontal end-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## VERTICAL END-HANDHOLDS

NUMBER: Two (2) on full-width platform end-sill cars, as heretofore described.

DIMENSIONS: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, eighteen (18), preferably twenty four (24), inches.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) on each end of car opposite ladder, not more than eight (8) inches from side of car; clearance of bottom end of handhold shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

MANNER OF APPLICATION: Vertical end-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one half ( $\frac{1}{2}$ ) inch rivets.

## UNCOUPLING-LEVERS

NUMBER: Two (2).

Uncoupling-levers may be either single or double, and of any efficient design.

DIMENSIONS: Handles of uncoupling-levers, *except* those shown on Plate B or of similar designs, shall be not more than six (6) inches from side of car.

Uncoupling-levers of design shown on Plate B and of similar designs shall conform to the following-prescribed limits:

Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift-arms shall be not less than seven (7) inches long.

Center of eye at end of center lift-arm shall be not more than three and one-half ( $3\frac{1}{2}$ ) inches beyond center of eye of uncoupling-pin or coupler when horn of coupler is against the buffer-block or end-sill. (See Plate B.)



Ends of handles shall extend not less than four (4) inches below bottom of end-sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See Plate B.)

Handles of uncoupling-levers of the "rocking" or "push-down" type shall be not less than eighteen (18) inches from top of rail when lock-block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

LOCATION: One (1) on each end of car.

When single lever is used it shall be placed on left side of end of car.

## HOPPER CARS AND HIGH-SIDE GONDOLAS WITH FIXED ENDS

*[Cars with sides more than thirty-six (36) inches above the floor are high-side cars.]*

### HAND-BRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of, and not more than twenty-two (22) inches from, center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

### BRAKE-STEP

Same as specified for "Box and other house cars."

### SILL-STEPS

Same as specified for "Box and other house cars."

## LADDERS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars," *except* that top ladder-tread shall be located not more than four (4) inches from top of car.

LOCATION: Same as specified for "Box and other house cars."

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS

Same as specified for "Box and other house cars."

## HORIZONTAL END-HANDHOLDS

Same as specified for "Box and other house cars."

## VERTICAL END-HANDHOLDS

Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

## END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step or uncoupling lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## DROP-END HIGH-SIDE GONDOLA CARS

## HAND-BRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SILL-STEPS

Same as specified for "Box and other house cars."

## LADDERS

NUMBER: Two (2).

DIMENSIONS: Same as specified for "Box and other house cars," *except* that top ladder-tread shall be located not more than four (4) inches from top of car.

LOCATION: One (1) on each side, not more than eight (8) inches from right end of car, measured from inside edge of ladder-stile or clearance of ladder-treads to corner of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS

Same as specified for "Box and other house cars."

## HORIZONTAL END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### FIXED-END LOW-SIDE GONDOLA AND LOW-SIDE HOPPER CARS

*[Cars with sides thirty-six (36) inches or less above the floor are low-side cars.]*

#### HAND-BRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not more than twenty-two (22) inches from center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## BRAKE-STEP

Same as specified for "Box and other house cars."

## SILL-STEPS

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## HORIZONTAL END-HANDHOLDS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) near each side on each end of car not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

## END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-step, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## DROP-END LOW-SIDE GONDOLA CARS

## HANDBRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars," provided that top brake-shaft support may be omitted.

## SILL-STEPS

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS

NUMBER: Same as specified for "Box and other house cars."



**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### END-HANDHOLDS

**NUMBER:** Four (4).

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.



## FLAT CARS

*[Cars with sides twelve (12) inches or less above the floor may be equipped the same as flat cars.]*

## HAND-BRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on the end of car to the left of center, or on side of car not more than thirty-six (36) inches from right-hand end thereof.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SILL-STEPS

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

### TANK-CARS WITH SIDE-PLATFORMS

#### HAND-BRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### SILL-STEPS

Same as specified for "Box and other house cars."

#### SIDE-HANDHOLDS

NUMBER: Four (4) or more.

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands, four (4) additional vertical handholds shall be applied, one

(1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### TANK-HEAD HANDHOLDS

NUMBER: Two (2). [*Not required if safety-railing runs around ends of tank.*]

DIMENSIONS: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel. Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

LOCATION: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform.

MANNER OF APPLICATION: Tank-head handholds shall be securely fastened.

#### SAFETY-RAILINGS

NUMBER: One (1) continuous safety-railing running around sides and ends of tank, securely fastened to tank or tank-bands at ends and sides of tank; or two (2) running full length of tank at sides of car supported by posts.

**DIMENSIONS:** Not less than three-fourths ( $\frac{3}{4}$ ) of an inch, iron.

**LOCATION:** Running full length of tank either at side supported by posts or securely fastened to tank or tank-bands, not less than thirty (30) nor more than sixty (60) inches above platform.

**MANNER OF APPLICATION:** Safety-railings shall be securely fastened to tank-body, tank-bands or posts.

#### UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### TANK CARS WITHOUT SIDE-SILLS AND TANK CARS WITH SHORT SIDE-SILLS AND END-PLATFORMS

#### HAND-BRAKES

**NUMBER:** Same as specified for "Box and other house cars."

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### RUNNING-BOARDS

NUMBER: One (1) continuous running-board around sides and ends; or two (2) running full length of tank, one (1) on each side.

DIMENSIONS: Minimum width on sides, ten (10) inches. Minimum width on ends, six (6) inches.

LOCATION: Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

MANNER OF APPLICATION: If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

#### SILL-STEPS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) near each end on each side under side-handhold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### LADDERS

*[If running-boards are so located as to make ladders necessary.]*

NUMBER: Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

DIMENSIONS: Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half ( $1\frac{1}{2}$ ) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

MANNER OF APPLICATION: Ladders shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### SIDE-HANDHOLDS

NUMBER: Four (4) or more.

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional vertical handholds shall be applied, one



(1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### TANK-HEAD HANDHOLDS

NUMBER: Two (2). [*Not required if safety-railing runs around ends of tank.*]

DIMENSIONS: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

MANNER OF APPLICATION: Tank-head handholds shall be securely fastened.

#### SAFETY-RAILINGS

NUMBER: One (1) running around sides and ends of tank or two (2) running full length of tank.

DIMENSIONS: Minimum diameter, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two and one-half ( $2\frac{1}{2}$ ) inches.



LOCATION: Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

MANNER OF APPLICATION: Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

#### UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

### TANK CARS WITHOUT END-SILLS

#### HAND-BRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### BRAKE-STEP

Same as specified for "Box and other house cars."

## RUNNING-BOARDS

NUMBER: One (1).

DIMENSIONS: Minimum width on sides, ten (10) inches.  
Minimum width on ends, six (6) inches.

LOCATION: Continuous around sides and ends of tank.

MANNER OF APPLICATION: If running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

## SILL-STEPS

NUMBER: Four (4). [*If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.*]

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

MANNER OF APPLICATION: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over; or with one-half ( $\frac{1}{2}$ ) inch rivets.

## SIDE-HANDHOLDS

NUMBER: Four (4) or more.

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Horizontal: One (1) near each end on each side of car over sill-step, on running board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### END-HANDHOLDS

**NUMBER:** Four (4).

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Horizontal: One (1) near each side on each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line of coupler.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### SAFETY-RAILINGS

**NUMBER:** One (1).

**DIMENSIONS:** Minimum diameter seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two and one-half ( $2\frac{1}{2}$ ) inches.

**LOCATION:** Safety-railings shall be continuous around

sides and ends of car, not less than thirty (30) nor more than sixty (60), inches above running-board.

MANNER OF APPLICATION: Safety-railings shall be securely fastened to tank or tank-bands, and secured against end shifting.

#### UNCOUPLING-LEVERS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars," *except* that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

LOCATION: Same as specified for "Box and other house cars," *except* that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

#### END-LADDER CLEARANCE

No part of car above buffer-block within thirty (30) inches from side of car, *except* brake-shaft, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than exceptions herein noted, shall extend beyond the face of buffer-block.

### CABOOSE CARS WITH PLATFORMS

#### HAND-BRAKES

NUMBER: Each caboose car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars with platforms shall be located on platform to the left of center.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### RUNNING-BOARDS

**NUMBER:** One (1) longitudinal running-board.

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### LADDERS

**NUMBER:** Two (2).

**DIMENSIONS:** None specified.

**LOCATION:** One (1) on each end.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### ROOF-HANDHOLDS

**NUMBER:** One (1) over each ladder.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** On roof of caboose, in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### CUPOLA-HANDHOLDS

NUMBER: One (1) or more.

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) continuous handhold extending around top of cupola not more than three (3) inches from edge of cupola-roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

MANNER OF APPLICATION: Cupola-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside and riveted over or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### SIDE-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, thirty-six (36) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) near each end on each side of car, curving downward toward center of car from a point not less than thirty (30) inches above platform to a point not more than eight (8) inches from bottom of car. Top end of handhold shall be not more than eight (8) inches from outside face of end-sheathing.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."



## END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side on each end of car on face of platform end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of platform end-sill.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## END-PLATFORM HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) right-angle handhold on each side of each end extending horizontally from door-post to corner of car at approximate height of platform-rail, then downward to within twelve (12) inches of bottom of car.

MANNER OF APPLICATION: Handholds shall be securely fastened with bolts, screws or rivets.

## CABOOSE PLATFORM-STEPS

Safe and suitable box steps leading to caboose platforms shall be provided at each corner of caboose.

Lower tread of step shall be not more than twenty-four (24) inches above top of rail.

## UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."



## CABOOSE CARS WITHOUT PLATFORMS

## HAND-BRAKES

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars without platforms shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## BRAKE-STEP

Same as specified for "Box and other house cars."

## RUNNING-BOARDS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SILL-STEPS

Same as specified for "Box and other house cars."

## SIDE-DOOR STEPS

NUMBER: Two (2) [*if caboose has side-doors*].

DIMENSIONS: Minimum length, five (5) feet.

Minimum width, six (6) inches.

Minimum thickness of tread, one and one-half ( $1\frac{1}{2}$ ) inches.

Minimum height of back-stop, three (3) inches.

Minimum height from top of rail to top of tread, twenty-four (24) inches.

LOCATION: One (1) under each side-door.

MANNER OF APPLICATION: Side-door steps shall be supported by two (2) iron brackets having a minimum cross-sectional area seven-eighths ( $\frac{7}{8}$ ) by three (3) inches or equivalent, each of which shall be securely fastened to car by not less than two (2) three-fourth ( $\frac{3}{4}$ ) inch bolts.

#### LADDERS

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Same as specified for "Box and other house cars," *except* when caboose has side-doors, then side-ladders shall be located not more than eight (8) inches from doors.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### ROOF-HANDHOLDS

NUMBER: Four (4).

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** One (1) over each ladder, on roof in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

**MANNER OF APPLICATION:** Roof-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### CUPOLA-HANDHOLDS

**NUMBER:** One (1) or more.

**DIMENSIONS:** Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

**LOCATION:** One (1) continuous cupola-handhold extending around top of cupola, not more than three (3) inches from edge of cupola roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

**MANNER OF APPLICATION:** Cupola-handhold shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside and riveted over or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### SIDE-HANDHOLDS

**NUMBER:** Four (4).

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler. Clearance

of outer end of handhold shall be not more than eight (8) inches from end of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### SIDE-DOOR HANDHOLDS

NUMBER: Four (4): Two (2) curved, two (2) straight.

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) curved handhold, from a point at side of each door opposite ladder, not less than thirty-six (36) inches above bottom of car, curving away from door downward to a point not more than six (6) inches above bottom of car.

One (1) vertical handhold at ladder side of each door from a point not less than thirty-six (36) inches above bottom of car to a point not more than six (6) inches above level of bottom of door.

MANNER OF APPLICATION: Side-door handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### HORIZONTAL END-HANDHOLDS

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Same as specified for "Box and other house cars," *except* that one (1) additional end-handhold shall be on each end of cars with platform end-sills as heretofore described, unless car has door in center of end. Said handhold shall be not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### VERTICAL END-HANDHOLDS

Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS

Same as specified for "Box and other house cars."

### PASSENGER-TRAIN CARS WITH WIDE VESTIBULES

#### HAND-BRAKES

NUMBER: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

#### SIDE-HANDHOLDS

NUMBER: Eight (8).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, metal.

Minimum clear length, sixteen (16) inches.

Minimum clearance, one and one-fourth ( $1\frac{1}{4}$ ), preferably one and one-half ( $1\frac{1}{2}$ ), inches.

LOCATION: Vertical: One (1) on each vestibule door-post.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with bolts, rivets or screws.

#### END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Handholds shall be flush with or project not more than one (1) inch beyond vestibule face.

LOCATION: Horizontal: One (1) near each side on each end projecting downward from face of vestibule end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: End-handholds shall be securely fastened with bolts or rivets.

When marker-sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

#### UNCOUPLING-LEVERS

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

#### PASSENGER-TRAIN CARS WITH OPEN END-PLATFORMS

##### HAND-BRAKES

NUMBER: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.



## END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

LOCATION: Horizontal: One (1) near each side of each end on face of platform end-sill, projecting downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of end-sill.

MANNER OF APPLICATION: End-handholds shall be securely fastened with bolts or rivets.

## END PLATFORM-HANDHOLES

NUMBER: Four (4). [*Cars equipped with safety-gates do not require end platform-handholds.*]

DIMENSIONS: Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches metal.

LOCATION: Horizontal from or near door-post to a point not more than twelve (12) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform. Horizontal portion shall be not less than twenty-four (24) inches in length nor more than forty (40) inches above platform.

MANNER OF APPLICATION: End platform-handholds shall be securely fastened with bolts, rivets or screws.

## UNCOUPLING-LEVERS

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling-attachment, forty-two (42) inches, measured from center of end of car to handle of attachment.



On passenger-train cars used in freight or mixed-train service the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

## PASSENGER-TRAIN CARS WITHOUT END-PLATFORMS

### HAND BRAKES

**NUMBER:** Each passenger-train car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

**LOCATION:** Each hand-brake shall be so located that it can be safely operated while car is in motion.

### SILL-STEPS

**NUMBER:** Four (4).

**DIMENSIONS:** Minimum length of tread ten (10), preferably twelve (12), inches.

Minimum cross-sectional area one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches or equivalent, wrought iron or steel.

Minimum clear depth eight (8) inches.

**LOCATION:** One (1) near each end on each side not more than twenty-four (24) inches from corner of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than two (2) inches inside of face of side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

**MANNER OF APPLICATION:** Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## SIDE-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16), preferably twenty-four (24), inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: Horizontal or vertical: One (1) near each end on each side of car over sill-step.

If horizontal, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

If vertical, lower end not less than eighteen (18) nor more than twenty-four (24) inches above center line of coupler.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with bolts, rivets or screws.

## END-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: Horizontal: One (1) near each side on each end projecting downward from face of end-sill or sheathing. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

End-handholds shall be securely fastened with bolts or rivets.

When marker sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable

steps and handholds shall be provided for men to reach such sockets or brackets.

#### END-HANDRAILS

[*On cars with projecting end-sills.*]

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: One (1) on each side of each end, extending horizontally from door-post or vestibule-frame to a point not more than six (6) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform end-sill; horizontal portion shall be not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

MANNER OF APPLICATION: End-handrails shall be securely fastened with bolts, rivets or screws.

#### SIDE-DOOR STEPS

NUMBER: One (1) under each door.

DIMENSIONS: Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum cross-sectional area, one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches or equivalent, wrought iron or steel.

Minimum clear depth, eight (8) inches.

LOCATION: Outside edge of tread of step not more than two (2) inches inside of face of side of car.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

MANNER OF APPLICATION: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Side-door steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when

possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

A vertical handhold not less than twenty-four (24) inches in clear length shall be applied above each side-door step on door-post.

#### UNCOUPLING-LEVERS

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachment shall be so applied that the coupler can be operated from the left side of car.

### STEAM LOCOMOTIVES USED IN ROAD SERVICE

#### TENDER SILL-STEPS

NUMBER: Four (4) on tender.

DIMENSIONS: Bottom tread not less than eight (8) by twelve (12) inches, metal.

[*May have wooden treads.*]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

LOCATION: One (1) near each corner of tender on sides.

MANNER OF APPLICATION: Tender sill-steps shall be securely fastened with bolts or rivets.

#### PILOT SILL-STEPS

NUMBER: Two (2).

DIMENSIONS: Tread not less than eight (8) inches in width by ten (10) inches in length, metal.

[*May have wooden treads.*]

LOCATION: One (1) on or near each end of buffer-beam outside of rail and not more than sixteen (16) inches above rail.

MANNER OF APPLICATION: Pilot sill-steps shall be securely fastened with bolts or rivets.

#### PILOT-BEAM HANDHOLDS

NUMBER: Two (2).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14), preferably sixteen (16), inches.

Minimum clearance, two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) on each end of buffer-beam.

*[If uncoupling-lever extends across front end of locomotive to within eight (8) inches of end of buffer-beam, and is seven-eighths ( $\frac{7}{8}$ ) of an inch or more in diameter, securely fastened, with a clearance of two and one-half ( $2\frac{1}{2}$ ) inches, it is a handhold.]*

MANNER OF APPLICATION: Pilot-beam handholds shall be securely fastened with bolts or rivets.

#### SIDE-HANDHOLDS

NUMBER: Six (6).

DIMENSIONS: Minimum diameter, if horizontal, five-eighths ( $\frac{5}{8}$ ) of an inch; if vertical, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Horizontal, minimum clear length, sixteen (16) inches.

Vertical, clear length equal to approximate height of tank.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: Horizontal or vertical: If vertical, one (1) on each side of tender within six (6) inches of rear or on corner, if horizontal, same as specified for "Box and other house cars."

One (1) on each side of tender near gangway; one (1) on each side of locomotive at gangway; applied vertically.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

## REAR-END HANDHOLDS

NUMBER: Two (2).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14) inches.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: Horizontal: One (1) near each side of rear end of tender on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of tender.

MANNER OF APPLICATION: Rear-end handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

## UNCOUPLING-LEVERS

NUMBER: Two (2) double levers, operative from either side.

DIMENSIONS: Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender with a guard bent on handle to give not less than two (2) inches clearance around handle.

LOCATION: One (1) on rear end of tender and one (1) on front end of locomotive.

Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

MANNER OF APPLICATION: Uncoupling-levers shall be securely fastened with bolts or rivets.

## COUPLERS

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.



STEAM LOCOMOTIVES USED IN SWITCHING  
SERVICE

## FOOTBOARDS

NUMBER: Two (2) or more.

DIMENSIONS: Minimum width of tread, ten (10) inches, wood.

Minimum thickness of tread, one and one-half ( $1\frac{1}{2}$ ), preferably two (2), inches.

Minimum height of back-stop, four (4) inches above tread.

Height from top of rail to top of tread, not more than twelve (12) nor less than nine (9) inches.

LOCATION: Ends or sides.

If on ends, they shall extend not less than eighteen (18) inches outside of gauge of straight track, and shall be not more than twelve (12) inches shorter than buffer-beam at each end.

MANNER OF APPLICATION: End footboards may be constructed in two (2) sections, *provided* that practically all space on each side of coupler is filled; each section shall be not less than three (3) feet in length.

Footboards shall be securely bolted to two (2) one (1) by four (4) inches metal brackets, *provided* footboard is not cut or notched at any point.

If footboard is cut or notched or in two (2) sections, not less than four (4) one (1) by three (3) inches metal brackets shall be used, two (2) located on each side of coupler. Each bracket shall be securely bolted to buffer-beam, end-sill or tank-frame by not less than two (2) seven-eighths ( $\frac{7}{8}$ ) inch bolts.

If side footboards are used, a substantial handhold or rail shall be applied not less than thirty (30) inches nor more than sixty (60) inches above tread of footboard.

## SILL-STEPS

NUMBER: Two (2) or more.

DIMENSIONS: Lower tread of step shall be not less than



eight (8) by twelve (12) inches, metal. [*May have wooden treads.*]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

LOCATION: One (1) or more on each side at gangway secured to locomotive or tender.

MANNER OF APPLICATION: Sill-steps shall be securely fastened with bolts or rivets.

#### END-HANDHOLDS

NUMBER: Two (2).

DIMENSIONS: Minimum diameter, one (1) inch, wrought iron or steel.

Minimum clearance, four (4) inches, *except* at coupler casting or braces, when minimum clearance shall be two (2) inches.

LOCATION: One (1) on pilot buffer-beam; one (1) on rear end of tender, extending across front end of locomotive and rear end of tender. Ends of handholds shall be not more than six (6) inches from ends of buffer-beam or end-sill, securely fastened at ends.

MANNER OF APPLICATION: End-handholds shall be securely fastened with bolts or rivets.

#### SIDE-HANDHOLDS

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Clear length equal to approximate height of tank.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

LOCATION: Vertical: One (1) on each side of tender near front corner; one (1) on each side of locomotive at gangway.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with bolts or rivets.

## UNCOUPLING-LEVERS

NUMBER: Two (2) double levers, operative from either side.

DIMENSIONS: Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender, with a guard bent on handle to give not less than two (2) inches clearance around handle.

LOCATION: One (1) on rear end of tender and one (1) on front end of locomotive.

## HANDRAILS AND STEPS FOR HEADLIGHTS

Switching-locomotive with sloping tenders with manhole or headlight located on sloping portion of tender shall be equipped with secure steps and handrail or with platform and handrail leading to such manhole or headlight.

## END-LADDER CLEARANCE

No part of locomotive or tender *except* draft-rigging, coupler and attachments, safety-chains, buffer-block, foot-board, brake-pipe, signal-pipe, steam-heat pipe or arms of uncoupling-lever shall extend to within fourteen (14) inches of a vertical plane passing through the inside face of knuckle when closed with horn of coupler against buffer-block or end-sill.

## COUPLERS

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

SPECIFICATIONS COMMON TO ALL STEAM  
LOCOMOTIVES

## HAND-BRAKES

Hand-brakes will not be required on locomotives nor on tenders when attached to locomotives.

If tenders are detached from locomotives and used in special service, they shall be equipped with efficient hand-brakes.

## RUNNING-BOARDS

NUMBER: Two (2).

DIMENSIONS: Not less than ten (10) inches wide. If of wood, not less than one and one-half ( $1\frac{1}{2}$ ) inches in thickness; if of metal, not less than three-sixteenths ( $\frac{3}{16}$ ) of an inch, properly supported.

LOCATION: One (1) on each side of boiler extending from cab to front end near pilot-beam. [*Running-boards may be in sections. Flat-top steam-chests may form section of running-board.*]

MANNER OF APPLICATION: Running boards shall be securely fastened with bolts, rivets or studs.

Locomotives having Wootten type boilers with cab located on top of boiler more than twelve (12) inches forward from boiler-head shall have suitable running-boards running from cab to rear of locomotive, with handrailings not less than twenty (20) nor more than forty-eight (48) inches above outside edge of running-boards, securely fastened with bolts, rivets or studs.

## HANDRAILS

NUMBER: Two (2) or more.

DIMENSIONS: Not less than one (1) inch in diameter, wrought iron or steel.

LOCATION: One (1) on each side of boiler extending from near cab to near front end of boiler, and extending across front end of boiler, not less than twenty-four (24) nor more than sixty-six (66) inches above running-board.

**MANNER OF APPLICATION:** Handrails shall be securely fastened to boiler.

#### TENDERS OF VANDERBILT TYPE

Tenders known as the Vanderbilt type shall be equipped with running-boards; one (1) on each side of tender not less than ten (10) inches in width and one (1) on top of tender not less than forty-eight (48) inches in width, extending from coal space to rear of tender.

There shall be a handrail on each side of top running-board, extending from coal space to rear of tank, not less than one (1) inch in diameter and not less than twenty (20) inches in height above running-board from coal space to manhole.

There shall be a handrail extending from coal space to within twelve (12) inches of rear of tank, attached to each side of tank above side running-board, not less than thirty (30) nor more than sixty-six (66) inches above running-board.

There shall be one (1) vertical end-handhold on each side of Vanderbilt type of tender, located within eight (8) inches of rear of tank extending from within eight (8) inches of top of end-sill to within eight (8) inches of side handrail. Post supporting rear end of side running-board if not more than two (2) inches in diameter and properly located, may form section of handhold.

An additional horizontal end-handhold shall be applied on rear end of all Vanderbilt type of tenders which are not equipped with vestibules. Handhold to be located not less than thirty (30) nor more than sixty-six (66) inches above top of end-sill. Clear length of handhold to be not less than forty-eight (48) inches.

Ladders shall be applied at forward ends of side running-boards.

#### HANDRAILS AND STEPS FOR HEADLIGHTS

Locomotives having headlights which can not be safely and conveniently reached from pilot-beam or steam-chests

shall be equipped with secure handrails and steps suitable for the use of men in getting to and from such headlights.

A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight (48) inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets.

#### COUPLERS

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Cars of construction not covered specifically in the foregoing sections, relative to handholds, sill-steps, ladders, hand-brakes and running-boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sill-steps, ladders, hand-brakes and running-boards as are required for cars of the nearest approximate type.

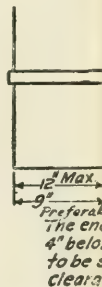
“RIGHT” or “LEFT” refers to side of person when facing end, or side of car from ground.

To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of five (5) per cent below size given is permitted.

*And it is further ordered,* That a copy of this order be at once served on all common carriers, subject to the provisions of said act, in a sealed envelope by registered mail.



Application to conc



### Application to outside



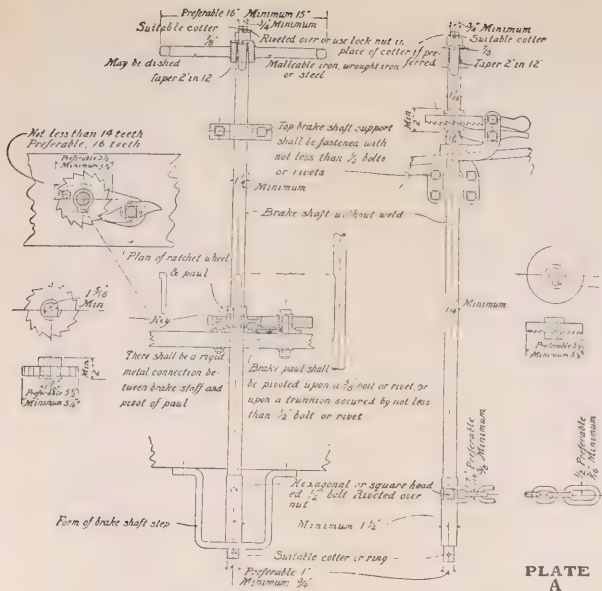
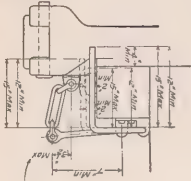


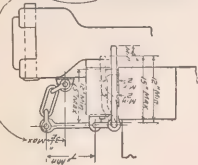
PLATE  
A

[Any efficient arrangement of ratchet-wheel and pawl may be used.]





This dimension to be taken  
when horn of coupler is  
square buffer block or  
rod is used when rod  
bracket is used when rod  
is in extreme forward  
position in bracket.



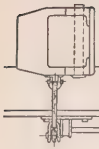
# Application to outside end sill cars

## PLATE B

The end of handle to extend not less than  
4\"/>



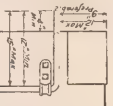
When necessary the rod should be bent or  
retainer piece arranged to clear brake staff.  
dom in lifting and full play in bracket.



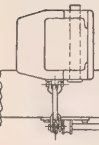
Graduated lock castings may be used.

# Application to concealed end sill cars

The end of handle to extend not less than  
4\"/>

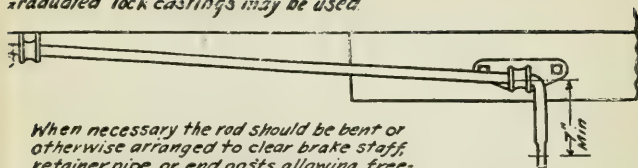


When necessary the rod should be bent or  
retainer piece arranged to clear brake staff.  
dom in lifting and full play in bracket.

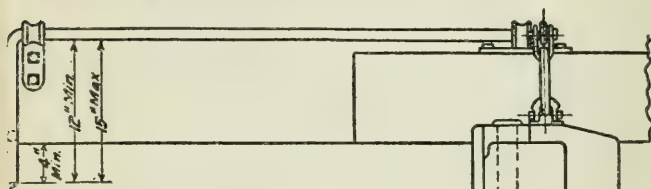


Graduated lock castings may be used.

*Graduated lock castings may be used.*



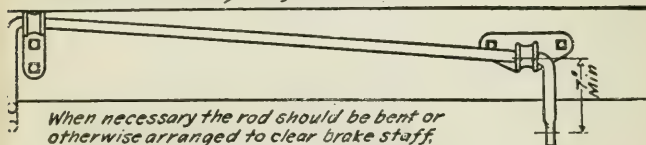
*When necessary the rod should be bent or otherwise arranged to clear brake staff, retainer pipe, or end posts, allowing freedom in lifting and full play in bracket*



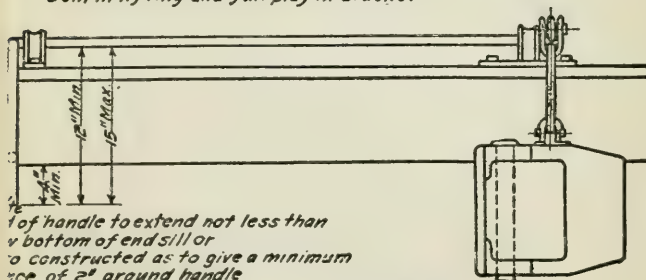
*End of handle to extend not less than 2 inches below bottom of end sill or so constructed as to give a minimum clearance of 2 inches around handle.*

*Sealed endsill cars*

*Graduated lock castings may be used.*



*When necessary the rod should be bent or otherwise arranged to clear brake staff, retainer pipe, or end posts, allowing freedom in lifting and full play in bracket*



*End of handle to extend not less than 2 inches below bottom of end sill or so constructed as to give a minimum clearance of 2 inches around handle.*

*Sealed endsill cars*

**PLATE  
B**

## APPENDIX N

### ORDER OF THE INTERSTATE COMMERCE COMMISSION, MARCH 13, 1911

In the matter of the extension of the period within which common carriers shall comply with the requirements of an act entitled, "An act to supplement 'an act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes,' and other safety appliance acts, and for other purposes," approved April 14, 1910, as amended by "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911.

Whereas, pursuant to the provisions of the act above stated, the Interstate Commerce Commission, by its orders duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location, and manner of application of the appliances provided for by section 2 of the act aforesaid and section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, known as the "Safety Appliance Acts;" and whereas the matter of extending the period within which common carriers shall comply with the provisions of section 2 of the act first aforesaid being under consideration, upon full hearing and for good cause shown:

*It is ordered,* That the period of time within which said common carriers shall comply with the provisions of section

3 of said act in respect of the equipment of cars in service on the 1st day of July, 1911, be, and the same is hereby, extended as follows, to-wit:

#### FREIGHT-TRAIN CARS

(a) Carriers are not required to change the brakes from right to left side on steel or steel-underframe cars with platform end sills, or to change the end-ladders on such cars, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed in said order of March 13, 1911.

(b) Carriers are granted an extension of five years from July 1, 1911, to change the location of brakes on all cars other than those designated in paragraph (a) to comply with the standards prescribed in said order.

(c) Carriers are granted an extension of five years from July 1, 1911, to comply with the standards prescribed in said order in respect of all brake specifications contained therein, other than those designated in paragraphs (a) and (b), on cars of all classes.

(d) Carriers are not required to make changes to secure additional end-ladder clearance on cars that have ten or more inches end-ladder clearance, within thirty inches of side of car, until car is shopped for work amounting to practically rebuilding body of car, at which time they must be made to comply with the standards prescribed in said order.

(e) Carriers are granted an extension of five years from July 1, 1911, to change cars having less than ten inches end-ladder clearance, within thirty inches of side of car, to comply with the standards prescribed in said order.

(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in

said order in respect to handholds, running boards, ladders, sill steps, and brake staffs: *Provided*, That the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order.

#### PASSENGER-TRAIN CARS

(h) Carriers are granted an extension of three years from July 1, 1911, to change passenger-train cars to comply with the standards prescribed in said order.

#### LOCOMOTIVES, SWITCHING

(i) Carriers are granted an extension of one year from July 1, 1911, to change switching locomotives to comply with the standards prescribed in said order.

#### LOCOMOTIVES, OTHER THAN SWITCHING

(j) Carriers are granted an extension of two years from July 1, 1911, to change all locomotives of other classes to comply with the standards prescribed in said order.

## APPENDIX O

### BOILER INSPECTION—AMENDATORY ACT.<sup>1</sup>

An Act To amend an Act entitled “An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,” approved February seventeenth, nineteen hundred and eleven.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section two of the Act entitled “An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,” approved February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof.

Sec. 2. That the chief inspector and the two assistant chief inspectors, together with all the district inspectors, appointed under the Act of February seventeenth, nineteen hundred and eleven, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said Act of February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. That upon the passage of this Act all inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed by this Act.

Sec. 3. That nothing in this Act shall be held to alter, amend, change, repeal, or modify any other Act of Congress

<sup>1</sup> This Act was passed and approved while the work was on the press and consequently could not be inserted in its proper place following the Act of which it is amendatory. The latter Act will be found on page 379, *ante*.



than the said Act of February seventeenth, nineteen hundred and eleven, to which reference is herein specifically made, or any order of the Interstate Commerce Commission promulgated under the safety appliance Act of March second, eighteen hundred and ninety-three, and supplemental Acts.

Sec. 4. That this Act shall take effect six months after its passage, except as otherwise herein provided.

Approved, March 4, 1915.





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